Supreme Court, U.S.
FILED
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No. 00-

IN THE

Supreme Court of the United States

KEVIN THOMAS AND JOYCE BAKER,

Petitioners,

v.

ANCHORAGE EQUAL RIGHTS COMMISSION, MUNICIPALITY OF ANCHORAGE, PAULA HALEY, in her official capacity as the Executive Director of the Alaska State Commission for Human Rights,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Kevin Thomas and Joyce Baker, devoted Christians and residential landlords, brought an action challenging Alaska laws which require them to rent property to unmarried cohabitors in violation of their sincere religious beliefs. The United States Court of Appeals for the Ninth Circuit sitting en banc dismissed Thomas's and Baker's claims for lack of an Article III case or controversy and by its decision rendered pre-enforcement constitutional challenges to proscriptive laws virtually impossible to maintain even in the most sensitive First Amendment contexts.

The questions presented are:

1. Do Thomas and Baker have Article III standing to assert First Amendment challenges to proscriptive laws carrying both civil and criminal penalties, which they have violated and continue to violate, which local government agencies are mandated to enforce and have and are actively enforcing against individuals similarly situated, and the enforcement of which government refuses to disclaim?

2. Are Thomas's and Baker's First Amendment claims ripe for judicial review under Article III?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceeding below were:

Appellants (Respondents herein): Anchorage Equal Rights Commission, the Municipality of Anchorage, and Paula Haley in her official capacity as the Executive Director of the Alaska State Commission for Human Rights.

Appellees (Petitioners herein): Kevin Thomas, and Joyce Baker.[1]

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[1]Joyce Baker's husband, Gary Baker, who was a party to the action before the District Court, declined to participate in the appeal before the Court of Appeals.

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Appendix I

Notice of Prehearing Conference filed before the Alaska State Commission for Human Rights, dated September 7, 2000 ..... 189a

Petitioners Kevin Thomas and Joyce Baker pray that the Court issue a writ of certiorari to the United States Court of Appeals for the Ninth Circuit to review the en banc opinion of that court in *Thomas v. Anchorage Equal Rights Comm'n.*

OPINIONS BELOW

The Ninth Circuit's en banc opinions are reported at 220 F.3d 1134 (9th Cir. 2000). Appendix A (App. 1a) The opinions of the Ninth Circuit panel were published at 165 F.3d 692 (9th Cir. 1999). Appendix B (App. 35a); Appendix C (App. 91a). The unreported opinions of the District Court are reprinted at Appendix D (App. 111a) and Appendix E (App. 131a).

JURISDICTION

The Ninth Circuit en banc panel issued its decision on August 4, 2000. (App. 1a) This Court has jurisdiction to issue a writ of certiorari to the Ninth Circuit pursuant to 28 U.S.C. § 1254(1). The district court's jurisdiction was based upon 28 U.S.C. § 1331; 28 U.S.C. § 2201; and 42 U.S.C. § 1983.

STATUTES INVOLVED

The Ninth Circuit relied upon Article III of the United States Constitution, the Civil Rights Act, 42 U.S.C. § 1983, the Declaratory Judgment Act, 28 U.S.C. § 2201, the Alaska anti-marital status discrimination law, AS 18.80.100-.240, and the

Anchorage anti-marital status discrimination ordinance, AMC 5.20.020. Appendix F (App. 158a)

STATEMENT OF THE CASE

1. *Introduction.* This petition challenges the Ninth Circuit en banc panel's decision, with one concurrence and one dissent, to dismiss an important constitutional case involving sensitive First Amendment rights to freedom of speech and free exercise of religion for purported want of an Article III case or controversy. The en banc panel's avoidance of the important Constitutional questions in this case under the guise of standing and ripeness, reversing both the three-judge panel and the district court, gives adequate cause for Justice O'Scannlain's concurring question as to whether this decision exemplifies "a court afraid of a case."[2]

The First Amendment claims in this action raise important unanswered questions of constitutional law by calling for a "definitive application of *Employment Division v. Smith*, 494 U.S. 872 (1990), and its newly developed hybrid rights doctrine...." *Id.* Kevin Thomas and Joyce Baker challenge Alaska's subordination of the Free Exercise Clause of the First Amendment to the local interest to deter private marital status discrimination. Equating the Constitutional importance of Alaska's interest to deter marital status discrimination with the National interests to eradicate racial and gender discrimination, the Alaska Supreme Court has ruled that a compelling government interest exists to override a

[2] *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1147 (9th Cir. 2000) (en banc) (O'Scannlain, J., concurring).

landlord's First Amendment religious liberty.[3]

In avoiding this case, belying the opinions of this Court and nearly every other circuit and contradicting its own precedent, the Ninth Circuit virtually eliminated the ability of aggrieved individuals to mount pre-enforcement challenges to proscriptive laws carrying civil and criminal penalties, even in the most sensitive First Amendment contexts where the laws burden freedom of speech, free exercise of religion, and property ownership. Specifically, the Ninth Circuit ruled that Article III prohibits Thomas and Baker from asserting pre-enforcement First Amendment challenges to local housing laws which require them to rent property to unmarried cohabitors, and which prohibit them from engaging in religiously motivated speech.

As Christians, Thomas and Baker believe that unmarried cohabitation is sinful and that if they were to assist or facilitate cohabitation they would commit sin themselves. Were this the full extent of Thomas's and Baker's plight they might have been content to continue quietly in religiously based civil disobedience and hope for the best, namely that they would not be detected and prosecuted. But Thomas's and Baker's religious faith does not allow them such enshrouded solitude, for Thomas and Baker believe that they are commanded by God in the Bible to honor their government and its laws. Put plainly, for Thomas and Baker civil disobedience to their government is another form of sin against God. Thomas and Baker also believe that God would have them speak honestly and openly regarding their faith and how it relates to their religiously based rental policies.

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[3] *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274, 279-284 (Alaska) *cert. denied* 513 U.S. 979 (1994) (Thomas, J., dissenting).

Understanding that the local housing laws are proscriptive in nature and carry both civil and criminal penalties, that Alaska government agencies are statutorily and judicially mandated to not be mere complaint-taking bureaus but rather to enforce the laws by seeking out and eradicating discrimination,[4] that the agencies have twice enforced the laws in past legal action against similarly situated landlords through the Alaska Supreme Court,[5] that the agencies are presently enforcing the laws against Alaska Pacific University (a Methodist-based university),[6] and that the agencies refuse to disclaim an intent to enforce the laws, Thomas and Baker filed this action for declaratory and injunctive relief in order to vindicate their federal Constitutional rights.

The Ninth Circuit en banc panel's aberrant decision which overrules *sub silentio* four prior Ninth Circuit opinions, should be reviewed by this Court because it conflicts directly and in principle with this Court's and nearly every other Circuit Court of Appeals' decisions regarding Article III standing and ripeness. The Ninth Circuit's decision should also be reviewed because it impermissibly closes federal courthouse doors to citizens whose sensitive First Amendment rights to free speech and religious liberty are aggrieved by government proscription. By *Thomas*, it will be virtually impossible for citizens in nine states to obtain federal judicial review of unconstitutional laws

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[4]*See Hotel, Motel, Restaurant, Constr. Camp Employees & Bartenders Union v. Thomas*, 551 P.2d 942, 945 (Alaska 1976).

[5]*Swanner*, 874 P.2d 274; *Foreman v. Anchorage Equal Rights Comm'n*, 779 P.2d 1199 (Alaska 1989).

[6]*Alaska State Comm'n for Human Rights ex rel. Kristiann Kutzler v. Alaska Pac. Univ.*, ASCHR No. C-96-010 (Alaska State Commission for Human Rights). Appendix G (App. 162a)

without first subjecting themselves to criminal or civil enforcement. Of course, once state action is initiated, under the *Younger* abstention doctrine the only federal review which will be available to these citizens regarding their federal constitutional rights will be the discretionary review of this Court after the completion of lengthy state proceedings.[7]

Thomas and Baker "genuinely and immediately need to know whether a constitutionally valid law prohibits them from acting as they are and have been in the exercise of their religious beliefs," *Thomas*, 220 F.3d at 1151 (Kleinfeld, J., dissenting), and from speaking honestly and openly about their religious beliefs related to marriage and cohabitation. This Court should preclude the Ninth Circuit from "slam[ming] the courthouse door on their suit requesting an answer." *Id.*

2. *Facts*. Kevin Thomas and Joyce Baker are devoted members of the Christian faith. Baker has attended the Christian church for more than fifteen years, from time to time serving as a deaconess.[8] Thomas has attended the Christian church for many years working with youth. As Christians, Thomas's and Baker's religious beliefs are founded upon the

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[7] *See Younger v. Harris*, 401 U.S. 37 (1971); *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 477 U.S. 619, 625 (1986). By the Ninth Circuit's expansive application of the *Younger* abstention doctrine, the pending state proceeding which operates to foreclose federal jurisdiction need not be a proceeding to which the aggrieved citizen is a party, but instead merely a proceeding into which the citizen may intervene. *See Green v. City of Tucson*, 217 F.3d 1081, 1082-83 (9th Cir. 2000).

[8] An "Elder," "Deacon," or "Deaconess" in the Christian church is a man or woman who oversees the affairs of the church. The Bible delineates the qualifications of an Elder, Deacon, or Deaconess. (App. 166a, *quoting I Timothy* 3:1-7; *Titus* 1:5-9.) Pertinent affidavits contained in the Excerpt of Record before the Ninth Circuit are set forth at Appendix H. (App. 165a)

Bible, which they believe to be the absolute, true, and infallible word of God. (App. 165a, 171a)

Thomas and Baker have three religious beliefs which are central to this case. First, they believe that cohabitation between unmarried couples constitutes the sin of fornication and is grievously offensive to God.[9] Second, they believe that if they were to assist or facilitate someone else's cohabitation, they would commit sin themselves, render themselves hypocrites, and disqualify themselves from serving as an Elder, Deacon, or Deaconess in the Christian church. Third, they believe that they are commanded by God to honor their government and its laws. (App. 166a-169a, 172a-176a)

Thomas's and Baker's religious beliefs regarding cohabitation are rooted in a widely held tradition within Christianity extending from the Old Testament[10] to the New Testament,[11] the teachings of Christ,[12] the Apostle Paul,[13] the

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[9]To "cohabit" means "to live together in a sexual relationship when not legally married." *The American Heritage Dictionary* 259 (1980).

[10]*Genesis* 2:24; *Exodus* 22:16; *Leviticus* 19:20; *Deuteronomy* 22:13-21, 23:17; *Proverbs* 2:16, 5:3-6, 6:24-29, 7, 29:3; *Ecclesiastes* 7:26; *Hosea* 4:11.

[11]*Acts* 15:19-20; *Jude* 7; *Revelation* 2:14, 21:18, 22:15.

[12]*Matthew* 15:16-20; *Mark* 7:18-23.

[13]*Romans* 1:29; *I Corinthians* 5:9-11, 6:9; *II Corinthians* 12:21; *Galatians* 5:19-21; *Ephesians* 5:5; *Colossians* 3:5-6; *I Thessalonians* 4:3-4; *I Timothy* 1:8-11; *Hebrews* 13:4.

Apostle Peter,[14] and the Reformation leader John Calvin.[15] Thomas and Baker sincerely believe that marriage between a man and a woman is the only relationship, created by God, in which two people are to live together in sexual intimacy. (App. 166a-167a, 172a-174a) Thomas's and Baker's religious belief that they are commanded by God to honor their government and its laws is founded upon the teaching of the Apostle Paul.[16] Thomas and Baker sincerely believe that civil disobedience to their government is another form of sin against God.

Baker owns residential properties in Anchorage, Alaska, and conducts business as a landlord by renting to tenants. Thomas also owns and manages residential rental properties in Anchorage, Alaska. Thomas's and Baker's rental businesses are significantly impacted by their Christian faith because they commit themselves to practice their beliefs in all aspects of their lives, including their commercial activities. (App. 167a, 173a-174a) Thomas and Baker rent property without regard to race, religion, gender, and marital status.[17] However, based solely upon their Christian beliefs, Thomas and Baker will not

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[14]*I Peter* 4:1-6.

[15]John Calvin, *Calvin's Commentaries: The Epistles of Paul to the Romans and to the Thessalonians* 359 (David W. Torrance & Thomas F. Torrance, eds. Ross Mackenzie trans., 1960).

[16]*Romans* 13:1-7 (New American Standard trans.) ("Every person is to be in subjection to the governing authorities. For there is no authority except from God, and those which exist are established by God. Therefore, whoever resists authority has opposed the ordinance of God; and they who have opposed will receive condemnation on themselves.")

[17]Thomas and Baker rent to persons of all races, of any religion, of both genders, single persons, men and women married to one another, separated or widowed persons, single parents and grandparents. (App. 167a, 174a)

rent to unmarried couples who cohabit. *Id.*

Thomas and Baker offer their properties for rent under management policies which prohibit rental to unmarried cohabitors. Thomas and Baker have previously declined to rent to unmarried cohabitors. (App. 166a-167a, 174a)[18] Thomas and Baker continue in this rental practice and periodically are required to turn unmarried cohabitors away in order to remain true to their Christian convictions. *Id.* The Alaska and Anchorage housing laws[19] have been interpreted to require landlords to rent residential property to unmarried cohabitors regardless of religious beliefs. *Foreman*, 779 P.2d 1199; *Swanner*, 874 P.2d at 274. The laws also prohibit Thomas and Baker from offering their properties for rent pursuant to their religiously based management policies. AS 18.80.240(4); AMC 5.20.020(D).[20] Finally, the laws prohibit Thomas and Baker from engaging in religiously motivated speech by (1) inquiring of the marital status of potential tenants;[21] or (2) making any communication or statement which indicates a

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[18]Thomas and Baker always ask for a potential tenant's marital status. They also inform unmarried cohabitors of their religious beliefs regarding marriage and cohabitation because they believe that it would be contrary to God's will to lie, and they believe that they should stand up and be recognized as Christ's followers. (App. 168a, 174a)

[19]AS 18.80.240; AMC 05.20.020.

[20]Both laws make it "unlawful" to "offer ... real property with the understanding that a person may be discriminated against" "because of ... marital status." *Id.*

[21]AS 18.80.240(3); AMC 5.20.020(C).

preference against renting to unmarried cohabitors.[22]

Although Alaska and Anchorage adopted their housing laws in 1975, enforcement of the marital status provisions against landlords like Thomas and Baker has been clouded for all but nine months of the laws' existence. For the first thirteen years, the laws were not known to apply to unmarried cohabitors. The Alaska Supreme Court did not interpret the laws to prohibit discrimination against unmarried cohabitors until 1989. *Foreman*, 779 P.2d 1199. During the next five years, the laws were clouded by constitutional challenge. The constitutionality, both state and federal, of enforcing the laws against religious landlords was not decided by the Alaska Supreme Court until 1994. *Swanner*, 874 P.2d 274. The enforcement against Swanner started in 1989 immediately following the decision in *Foreman* applying the laws to unmarried cohabitation, and did not conclude until October, 1994. *Id. cert. denied* 513 U.S. 979 (Thomas, J., dissenting).[23]

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[22]On its face, the Anchorage ordinance has enormous breadth, literally prohibiting any "statement" of any "preference" regarding refusing to rent to unmarried cohabitors in any context. *See* AMC 5.20.020(C).

[23]The conclusion of the *Swanner* case left a substantial cloud over the laws. Dissenting from the denial of certiorari in *Swanner*, Justice Thomas explained that he was "quite skeptical that Alaska's asserted interest in preventing discrimination on the basis of marital status is 'compelling' enough to satisfy" the stringent standards established by this Court in *Sherbert v. Verner, 374 U.S. 398 (1963)*; *Wisconsin v. Yoder*, 406 U.S. 205 (1972); and *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983). *Swanner*, 513 U.S. at 980-981. Justice Thomas remarked: "If, despite affirmative discrimination by Alaska on the basis of marital status and a complete absence of any national policy against such discrimination, the State's asserted interest in this case is allowed to qualify as a 'compelling' interest – that is, a 'paramount' interest, an interest 'of the highest order' – then I am at a loss to know what asserted governmental interests are not compelling. The decision of the Alaska Supreme Court drains the word

Thomas and Baker filed this civil rights action in July, 1995. Nearly two years later enforcement of the laws against Thomas and Baker was permanently enjoined by the district court. (App. 156a-157a) That injunction remained in effect until August 4, 2000, when the Ninth Circuit issued its en banc decision. *Thomas*, 220 F.3d 1134. The window of opportunity for unfettered enforcement of these laws against religious landlords like Thomas and Baker has been narrow.

Thomas and Baker filed their complaints in this action knowing that the Alaska Supreme Court ruled in 1976 that the Alaska State Commission for Human Rights ("ASCHR") is statutorily commanded to not be a mere complaint-taking bureau but rather to enforce the discrimination laws and to *not* allow the laws to go into desuetude.[24] Thomas and Baker also knew that for the previous decade the ASCHR and the Anchorage Equal Rights Commission ("AERC") had enforced the laws against landlords who refused to rent to unmarried couples.[25] During the pendency of this case AERC threatened

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compelling of any meaning and seriously undermines the protection for exercise of religion...." *Id.* at 982.

[24]*Hotel, Motel*, 551 P.2d at 945 ("[T]he legislature intended the Commission to be more than a simple complaint-taking bureau; the statutory scheme constitutes a mandate to the agency to seek out and eradicate discrimination in . . . the sale, lease, or rental of real property.") AS 18.80.200 declares "as a matter of legislative finding" that it is the policy of the State of Alaska to "eliminate and prevent discrimination in" "the" "lease, or rental of real property because of" "marital status."

[25]*Foreman*, 779 P.2d 1199 (mid-1980s-1989); *Swanner*, 874 P.2d 274 (1989-1994). Regardless of whether Foreman was a religious individual or not (*Thomas*, 220 F.3d at 1140-1141 and n.6), the agencies enforced the laws against him. *See Foreman*, 779 P.2d 1199; *Thomas*, 220 F.3d at 1145 (O'Scannlain, J., concurring).

additional action against Tom Swanner "or any other landlord who refuses to rent to unmarried couples regardless of the landlord's religious beliefs."[26]

After the district court's permanent injunction, ASCHR filed a complaint to enforce the marital status laws against Alaska Pacific University ("APU")[27] due to APU's policy to not rent university housing to unmarried cohabitors. *See Alaska State Comm. for Human Rights ex rel. Kristiann Kutzler v. Alaska Pac. Univ.*, ASCHR No. C-96-010 (Alaska State Commission for Human Rights). Appendix G (App. 162a)[28] Throughout this action, including at oral argument before the Ninth Circuit en banc panel on March 23, 2000, the government has refused to disavow an intent to enforce the laws against Thomas and Baker.

3. *The Federal Constitutional Questions Were Timely*

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[26](App. 187a). Swanner's affidavit states that in a telephone call on January 9, 1996, AERC's staff informed him that the agency would enforce the marital status discrimination laws against him or any other landlord who refused to rent to unmarried couples. *Id.*

[27]APU, formerly Alaska Methodist University, is a college with a religious beginning and foundation. <*www.akohwy.com/a/alpauniv.htm*>.

[28]ASCHR's complaint charged APU with refusing to rent university housing to a female student who "proposed to occupy the apartment with her boyfriend" because "she was not married to her boyfriend." (App. 162a-163a) AS 18.80.100 authorizes the ASCHR executive director to file complaints against violating landlords. An adjudicatory hearing prosecuted by ASCHR follows failed conciliation. *See* AS 18.80.110; AS 18.80.120. ASCHR is mandated to prosecute, without citizen complaint, landlords who violate AS 18.80.240. *Hotel, Motel*, 551 P.2d at 945. After the en banc panel dismissed Thomas's and Baker's claims, ASCHR scheduled a pre-hearing conference in the APU matter for September 21, 2000. Appendix I (App. 189a)

And Properly Raised. Thomas and Baker filed complaints for injunctive and declaratory relief arguing that the local housing laws violate the Free Exercise Clause of the First Amendment as applied to them. The parties argued the Article III issues in cross-motions for summary judgment and the district court ruled that Thomas's and Baker's claims are justiciable. (App. 111a)

ASCHR did not originally brief Article III issues to the Ninth Circuit. AERC briefed only prudential ripeness. Justice Hawkins, however, raised Article III issues at oral argument. The three-judge panel affirmed on a divided vote. *Thomas*, 165 F.3d 692. Respondents petitioned for rehearing en banc. The Ninth Circuit requested additional briefs regarding standing and ripeness. The Ninth Circuit granted rehearing en banc and withdrew the panel decision. 192 F.3d 1208. The parties again filed supplemental briefing regarding Article III issues. The en banc panel heard oral argument. On August 4, 2000, the en banc panel dismissed Thomas's and Baker's claims for want of an Article III case or controversy. 220 F.3d 1134.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit's en banc decision that Thomas and Baker do not present a justiciable Article III case or controversy through their First Amendment pre-enforcement action, was made in contexts where: (1) the challenged Alaska housing laws are proscriptive in nature and carry both civil and criminal penalties; (2) the challenged laws prohibit Thomas's and Baker's religiously motivated rental practices and free speech; (3) the laws require Thomas and Baker to choose between the equally burdensome options of giving up their livelihoods as landlords, giving up their property, violating their religious

beliefs regarding rental to unmarried couples, or violating their religious beliefs about honoring the law, thereby risking criminal prosecution or costly civil enforcement; (4) Alaska government agencies are statutorily and judicially commanded to not allow the laws to go into desuetude or to be mere complaint-taking bureaus, but instead to actively enforce the laws by seeking out and eradicating discrimination through criminal prosecution and civil enforcement; (5) the window of opportunity for enforcement of the challenged laws has been narrow because the laws have been clouded by questions of legal interpretation and constitutional exemption for approximately twenty-four of their twenty-five year existence; (6) government agencies have nonetheless previously enforced the laws against landlords similar to Thomas and Baker in cases which have twice proceeded to the Alaska Supreme Court; (7) one agency recently filed an enforcement action which remains pending today against a Methodist university with rental policies identical to Thomas and Baker; and (8) the agencies refuse to disclaim an intent to enforce the laws against Thomas and Baker. The decision is in error because it "conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). This Court should grant the petition and review the Ninth Circuit's decision in order to correct the error.

The Ninth Circuit's decision that Thomas's and Baker's claims do not present an Article III case or controversy in the above contexts conflicts directly and in principle with decisions from nearly every other United States Circuit Court of Appeal. Sup. Ct. R. 10(a). This Court should grant the petition and review the Ninth Circuit's decision in order to correct the aberration.

This case presents important recurring unanswered questions of Constitutional law which should be settled by this Court. Sup. Ct. R. 10(c). This Court should delineate the

circumstances under which Article III allows a civil rights litigant to mount a First Amendment pre-enforcement challenge to proscriptive laws carrying civil and criminal penalties. This Court also should establish what constitutes a credible threat of prosecution for purposes of Article III standing and ripeness.

I. THE NINTH CIRCUIT'S EN BANC DECISION CONFLICTS WITH THIS COURT'S DECISIONS REGARDING ARTICLE III STANDING AND RIPENESS

The Ninth Circuit's holding that Thomas's and Baker's First Amendment claims fail for want of an Article III case or controversy conflicts with this Court's controlling precedent. The decision most directly on point is *Virginia v. American Booksellers Ass'n*, 484 U.S. 383 (1988). *Booksellers* involved a pre-enforcement challenge to a Virginia statute which made it unlawful, subject to criminal penalty, to knowingly display sexually explicit material accessible to juveniles. *Id.* at 386. The Virginia law required the plaintiffs (bookstores) to choose between (1) ceasing to sell covered material, (2) barring juveniles from their establishments, or (3) modifying the manner in which they displayed sexually explicit material. *Id.* at 388.

In *Booksellers* the Court unanimously ruled that the plaintiffs' claims presented a justiciable Article III case or controversy[29] stating that it was "not troubled by the pre-

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[29] Article III of the Constitution limits the "judicial power" of the United States to the resolution of "cases" or "controversies." *Valley Forge Christian College v. Americans United for Separation of Church and* State, 454 U.S. 464, 469 (1982); *Allen v. Wright*, 468 U.S. 737, 750 (1984); *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 297-298 (1979); *Steffel v. Thompson*, 415 U.S. 452, 458 (1974); *Aetna Life Ins. Co.*

enforcement nature of this suit," which was brought before the Virginia law even became effective. *Id.* at 392-393. The Court concluded that the plaintiffs' claims were justiciable principally because (1) the Virginia law was "aimed directly at plaintiffs, who, if their interpretation of the statute is correct, will have to take significant and costly compliance measures or risk criminal prosecution,"[30] and (2) "[t]he State has not suggested that the newly enacted law will not be enforced." *Id.*

In reaching this conclusion, the Court found significant, and virtually determinative, the possibility that the challenged law might chill First Amendment rights:

> We are not troubled by the pre-enforcement nature of this suit. The State has not suggested that the newly enacted law will not be enforced, and we see no reason to assume otherwise. We conclude that plaintiffs have alleged an actual and well-founded fear that the law will be enforced against them. Further, the alleged danger of this statute is, in large measure, one

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of Hartford Conn. v. Haworth, 300 U.S. 227, 239 (1937). The "case or controversy" requirement is reflected in the intertwining doctrines of standing and ripeness. While standing is primarily concerned with who is a proper party to litigate a particular matter, *FEC v. Akins*, 524 U.S. 11, 19-21 (1998); *Valley Forge*, 454 U.S. at 469; *Warth v. Seldin*, 422 U.S. 490, 498 (1975); *Steffel*, 415 U.S. at 458-459; *Doe v. Bolton*, 410 U.S. 179, 188 (1973), ripeness addresses when that litigation may occur. *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 140 (1974) ("ripeness is peculiarly a question of timing"); *Pacific Gas and Electric Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 200-201 (1983) ("premature adjudication"); *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-154 (1967).

[30] *Id.* at 392 *citing Craig v. Boren*, 429 U.S. 190, 194 (1976); *Bolton*, 410 U.S. at 188.

> of self-censorship; a harm that can be realized even without an actual prosecution.

Id. at 393.

The Ninth Circuit's decision that Thomas's and Baker's claims are not justiciable conflicts with *Booksellers*. The Alaska and Anchorage housing laws are aimed directly at landlords like Thomas and Baker, and have been interpreted to require rental to unmarried cohabitors regardless of religious beliefs.[31] Unlike the law in *Booksellers* which had not yet even become effective, the Alaska and Anchorage laws, which carry both civil and criminal penalties,[32] are currently in effect, they have been civilly enforced in the past against identical landlords in actions twice proceeding through the Alaska Supreme Court, and they are currently being enforced against an identical landlord, Alaska Pacific University.

Even more compelling than *Booksellers*, Thomas and Baker have violated the laws in the past by turning away unmarried cohabitors, at present they violate the laws by offering their properties for rent under management policies which prohibit rental to unmarried cohabitors,[33] they are periodically required to violate the laws by turning away unmarried cohabitors, and they plan to violate the laws in the

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[31] *Foreman*, 779 P.2d at 1199; *Swanner*, 874 P.2d 274.

[32] *See* AS 18.80.270 (misdemeanor punishable by $500 fine or up to 30 days in jail). Both laws allow the agencies to initiate investigations, hold hearings, compel attendance, enjoin violations, and issue appealable compliance orders. *See* AS 18.80.100-.145; AMC 5.30.010-.090.

[33] AS 18.80.240(4); AMC 5.20.020(D).

future by refusing rental to unmarried cohabitors.[34]

While this action was pending AERC threatened additional action against Tom Swanner.[35] ASCHR is statutorily and judicially commanded to enforce the laws without waiting for a citizen complaint and is not allowed to be a mere complaint-taking bureau. Like the State of Virginia, the government here has pointedly refused to disclaim an intent to enforce the laws against Thomas and Baker.[36] The only thing separating Thomas and Baker from prosecution for their now known and admitted past and present acts of discrimination is prosecutorial caprice.[37]

Like *Booksellers*, Thomas and Baker are presently harmed and chilled in their First Amendment rights because

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[34]Although the majority of the en banc panel expressed "prudential" ripeness concerns because they did not understand the exact combinations of unmarried individuals to whom Thomas and Baker would decline rental, *Thomas*, 220 F.3d at 1142 and n.8, this lack of understanding disregards the record. Justices O'Scannlain and Kleinfeld observed that, "it is hard to take seriously" "the majority's prudential concern about the need for a record to show just whom" Thomas and Baker "propose to discriminate against." 220 F.3d at 1144 n.1, 1149. Thomas and Baker have been crystal clear that the unmarried individuals to whom they decline rental are those who intend to "cohabit," *i.e.* live together in a sexually intimate relationship, in their properties. (Appendix H, App. 166a-169a ¶¶ 4-6, 10, 13; 172a-176a, ¶¶ 5-6, 10, 12.)

[35]App. 187a-188a; *Swanner*, 874 P.2d 274.

[36]At oral argument before the en banc panel, Justice O'Scannlain squarely asked Respondents to disclaim an intent to prosecute Thomas and Baker and Respondents refused to give the disclaimer.

[37]*See Hotel, Motel*, 551 P.2d at 945 (ASCHR has no discretion to ignore violations of the marital status discrimination law).

they are now faced with the equally onerous choices of (1) abandoning their livelihoods; (2) disposing of their properties; (3) self-censoring their religiously motivated speech;[38] (4) refraining from advertising for tenants who do not present religious concern; (5) complying with the laws by renting to unmarried cohabitors, thereby violating their religious beliefs regarding marriage, cohabitation, and facilitation of sin; and/or (6) disobeying the laws, regarding both discrimination and speech, thereby violating their religious beliefs about honoring their government and its laws. The danger of these laws is in large measure one of present religious injury and self-censorship; harm that is realized even without prosecution. *Id.* at 393.

The en banc panel's conclusion also cannot be squared with *Doe v. Bolton*, 410 U.S. 179. In *Bolton*, doctors alleged that Georgia abortion statutes infringed their associational and occupational liberty. *Id.* at 185. This Court had no difficulty

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[38]"[T]he First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 65 (1983) *quoting Police Dept. v. Mosely*, 408 U.S. 92, 95 (1972). With respect to non-commercial speech, this Court "has sustained content based restrictions only in the most extraordinary circumstances." *Id. citing Consolidated Edison Co. v. Pub. Serv. Comm'n*, 447 U.S. 530, 538-539 (1980). Commercial speech is "speech which does no more than propose a commercial transaction," *id. quoting Virginia State Bd. of Pharm. v. Virginia Cit. Consum. Counc.*, 425 U.S. 748, 762 (1976), and which is motivated by purely economic interest. *Id.* Thomas's and Baker's motivation for engaging in speech regarding the marital status of tenants, cohabitation, and marriage is purely religious. There is no "economic interest," *Virginia*, 425 U.S. at 761, which motivates this speech. The speech is inimical to Thomas's and Baker's economic interests because it relates to a topic which could deprive them of a ready, willing, and financially qualified tenant. Thomas's and Baker's "economic interests" beckon them to ignore the unmarried status of cohabiting tenants.

concluding that the doctors, licensed physicians consulted by pregnant women, presented justiciable claims despite the fact that none of them had ever been prosecuted, or threatened with prosecution, for violation of the law:

> The physician is the one against whom these criminal statutes directly operate in the event he procures an abortion that does not meet the statutory exceptions and conditions. The physician-appellants, therefore, assert a sufficiently direct threat of personal detriment.

Id. at 188.

Like the doctors subject to the Georgia abortion laws in *Bolton*, Thomas and Baker are the landlords against whom the Alaska and Anchorage marital status laws directly operate.[39]

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[39]The Alaska and Anchorage laws are not "generally applicable" because they are "under inclusive," *Smith*, 494 U.S. at 881-882; *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 531-545 (1993), in ways which devalue religious motivation and discriminate against religious landlords. Both laws contain gaping exceptions. By way of the Alaska statute a landlord can legally discriminate against unmarried cohabitors provided he simply classifies his rental units as being for "married couples only." AS 18.80.240. However, if Thomas and Baker decline to rent to unmarried cohabitors for religious reasons, they are guilty of a misdemeanor and subject to fine and jail. *Id.*; AS 18.80.270. By way of the municipal ordinance, a landlord may decline to rent to unmarried cohabitors if the rental unit shares common living space with the landlord's home. AMC 5.20.020. However, if Thomas and Baker decline to rent their stand-alone units to an unmarried couple for religious reasons, they violate the ordinance. By way of these laws, marital status discrimination, the so-called "social evil" which the laws are supposedly designed to eliminate, *Swanner*, 874 P.2d at 283, is specifically allowed for secular reasons. When a law punishes religiously motivated action in order to accomplish objectives which government does not deem worthy of protection against

Even more compelling than *Bolton*, where the Georgia abortion laws had never been enforced or threatened against the plaintiffs and also were not presently being enforced or threatened against other doctors, *id.* at 188-189, the Alaska and Anchorage laws have never been enforced or threatened directly against Thomas and Baker but they have been enforced and threatened against identical landlords in the recent past and present.[40] Further, the laws here, like the Georgia abortion laws, are fairly recent in application and effect and they have not been allowed to slip into desuetude. *Id.* at 189.[41] Thomas and Baker, like the doctors in *Bolton*, "should not be required to await and undergo a criminal prosecution as the sole means of seeking relief." *Id.* at 188.[42]

The Ninth Circuit's analysis regarding "threat" and "history" of enforcement (220 F.3d at 1140-1141) appears to be a misapplication of *Poe v. Ullman*, 367 U.S. 497 (1961). In

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identical secular conduct, the laws are not generally applicable and they violate government neutrality toward religion demanded by the First Amendment. *Hialeah*, 508 U.S. at 546; *accord Fraternal Order of Police v. City of Newark*, 170 F.3d 359, 364-366 (3rd Cir. 1999) (police department policy prohibiting beards which made exception for "medical" but not "religious" beards, was not generally applicable).

[40]*Foreman*, 779 P.2d 1199; *Swanner*, 874 P.2d 274; *Alaska Pacific University* (App. 162a-164a); *Swanner* (App. 187a-188a).

[41]The Georgia statute was five years old at the time of *Bolton*. *Id.* at 181-182. The Alaska and Anchorage laws had been applied to unmarried cohabitors only six years, *Foreman*, 779 P.2d 1199, and held applicable to religious landlords like Thomas and Baker only nine months, *Swanner*, 874 P.2d 274, as of the filing of this action.

[42]*Accord Steffel*, 415 U.S. at 480 (Rehnquist, J., concurring) ("the declaratory judgment procedure is an alternative to pursuit of an arguably illegal activity").

Bolton this Court reversed a similar misapplication of *Poe*:

> In holding that the physicians . . . did not present a justiciable controversy, the District Court seems to have relied primarily on *Poe v. Ullman*. . . . But the challenged Connecticut statute, deemed to prohibit the giving of medical advice on the use of contraceptives, had been enacted in 1879, and, apparently with a single exception, no one had ever been prosecuted under it. Georgia's statute, in contrast, is recent and not moribund. Furthermore, it is the successor to another Georgia abortion statute under which, we are told, physicians were prosecuted.

Id. at 188-189.

Unlike the contraceptive laws in *Poe* which had been in effect for close to a century and not enforced for decades despite widespread violation (*Poe*, 367 U.S. at 501-502), the Alaska and Anchorage laws are of fairly recent origin (1975), and the laws' application to unmarried cohabitation (1989, *Foreman*, 779 P.2d 1199) and religious landlords (1994, *Swanner*, 874 P.2d 274) is of very recent origin. Since the mid-1980s Alaska and Anchorage have civilly enforced the laws against landlords like Thomas and Baker nearly non-stop.[43] Moreover, the window of opportunity for unfettered enforcement of these laws against religious landlords has been narrow. Contrary to the Ninth Circuit's conclusion, Thomas and Baker present justiciable claims because this case parallels *Bolton* rather than *Poe*.

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[43] *Foreman* (1986-1989); *Swanner* (1989-1994), *Alaska Pacific University* (1997-2000).

There is no way to square the Ninth Circuit en banc panel's decision (220 F.3d at 1140-1141) with *Epperson v. Arkansas*, 393 U.S. 97 (1968). *Epperson* involved a biology teacher's challenge to the Arkansas anti-evolution statute which made it a misdemeanor, and cause for employment termination, to teach the theory of evolution to public school students. 393 U.S. at 100-101. Despite the fact that (1) the teacher had never violated the law, been prosecuted, been threatened with prosecution, been fired, or even threatened with firing, (2) in the law's 40 year existence no one had ever been prosecuted or fired, and (3) the law was "more of a curiosity than a vital fact of life," this Court ruled that it was its "duty to decide the issues presented." *Id.* at 102. Under the controlling rule of *Epperson*, where this Court found that the mere existence of a proscriptive law chilling First Amendment rights sustained justiciability, the Ninth Circuit has a "duty to decide the issues presented," *id.*, in this case.

The Ninth Circuit's "short shrift" "dismissal" of Thomas's and Baker's present religious injury, 220 F.3d at 1139, 1147 n.4, by being required to violate the law, conflicts with *School District of Abington Township v. Schempp*, 374 U.S. 203, 225 (1963). In *Schempp*, this Court found that a present religious injury, no matter how slight it might seem from a secular perspective – there simply requiring students either to sit through minutes of personally objectionable scripture reading or to absent their classroom, sustains justiciability. *Id.*[44]

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[44]The en banc majority off-handedly dismissed as "circular argument" (220 F.3d at 1139), Thomas's and Baker's point that, regardless of any civil or criminal enforcement against them, their religious liberty is presently harmed because they are forced into a "catch-22" situation wherein they must violate their religious belief regarding honoring the government and its laws (Romans 13) in order to abide by their religious beliefs regarding

The Ninth Circuit's decision conflicts directly and in principle with other decisions of this Court as well. *See Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (suit commenced four years before law was to take effect, and resolved *on the merits* by this Court two years before its effective date); *Akins*, 524 U.S. at 25 (voters seeking information from AIPAC presented a justiciable challenge to the FCC's determination that AIPAC was not a "political committee" and thus not subject to disclosure, despite the possibility that the FCC might have exercised its discretion to decline prosecution against AIPAC for non-disclosure even if the voters were right that AIPAC was a "political committee");[45] *Babbitt*, 442 U.S. at 298-301

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marriage, cohabitation and facilitation of sin. This "dismissive" denouncement is both incorrect and constitutionally impermissible. Thomas's and Baker's point would be "argument" if it was simply their own logic, but it is not because it is a tenet of their faith. (App. 169a, 176a) Thomas's and Baker's point would be "circular" if it had originated with them, but it did not because it originated in A.D. 56 with the Apostle Paul's writing of his Epistle to the Christians in Rome (particularly the portion of that epistle now referred to as chapter 13 verses 1-7). Zodhiates, *The Complete Word Study New Testament*, The Epistle of Paul to the Romans, p. 498 (AMG Publishers 2nd ed., June 1992). And, according to *II Timothy* 3:16 "[a]ll scripture is given by inspiration of God." According to *Frazee v. Illinois Dep't of Empl. Sec.*, 489 U.S. 829, 834-835 (1989) and *Thomas v. Review Board*, 450 U.S. 707, 715-716 (1981), the Ninth Circuit is not allowed to scoffingly dismiss the substance of Thomas's and Baker's sincerely held religious beliefs. *See Thomas*, 220 F.3d at 1147 n.4 (O'Scannlain, J., concurring). Thomas's and Baker's only relief from this dilemma would come by forfeiting their Fourteenth Amendment occupational liberty. *See Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) ("[Fourteenth Amendment 'liberty'] denotes . . . the right of the individual . . . to engage in any of the common occupations in life.")

[45]Contrary to *Akins*, the Ninth Circuit rejected Thomas's and Baker's claims because of the astronomical potential that Thomas and Baker might never be subject to civil enforcement if no unmarried tenant ever again asked to rent from them and, thereafter, filed a complaint with Respondents.

(plaintiffs presented justiciable challenge to union election procedures of Arizona statute even though they "admittedly have not invoked the Act's election procedures in the past nor have they expressed any intention of doing so in the future");[46]

In this respect, the Ninth Circuit ignored *Hotel, Motel*, 551 P.2d at 945, the criminal penalty of AS 18.80.270, and *Epperson*, 393 U.S. at 102. The Ninth Circuit also ignored the State of Alaska's argument that unmarried cohabitation is "becoming the most common living arrangement in the country" encompassing 32% of all households. *Haley's En Banc Brief*, 48 and n.18 *citing* Smith, Tom W., *The Emerging 21st Century American Family*, The General Social Survey, conducted by the University of Chicago's National Opinion Research Center, November 24, 1999 (available at <www.norc.edu/online/emerge/htm>); *Marital Status and Living Arrangements*, March 1998 (update), U.S. Bureau of the Census, Current Population Reports (available at U.S. Census Bureau Home Page <www.census.gov>).

[46]The plaintiffs in *Babbitt* presented justiciable claims against the challenged law's union election procedures despite their failure to invoke, and their disclaimer of an intent to invoke, election procedures because (a) the law worked a present harm to their associational right to organize (they were dissuaded from holding elections because of the law's onerous procedures) and (b) they faced potential future harm to be incurred in the event of an election (which they had no intention of holding) which could not be remedied legally. *Id.* at 299-301 and n.12. Here, Thomas and Baker presently violate the laws, plan to continue violating the laws, are presently harmed in their religious beliefs and/or occupational liberty by the laws, and later legal action cannot remedy their prior coerced religious infidelity. Thomas's and Baker's situation is thus significantly different than that of cases wherein the plaintiffs' injury hinges upon such contingencies as (a) their unplanned future engagement in unspecified illegal conduct, and (b) the government's unpredicted and unsanctioned unconstitutional response. *See, e.g., City of Los Angeles v. Lyons*, 461 U.S. 95, 101-103 (1983) (plaintiffs stated no intent to again engage in any illegal conduct and government had no policy directing unconstitutional response to general illegal activity); *Ashcroft v. Mattis*, 431 U.S. 171, 172 (1977) (plaintiff's remaining son had no intent to engage in any illegal conduct whereby he would be threatened by police use of deadly force); *Rizzo v. Goode*, 423

Abbott, 387 U.S. at 148-153 (purely legal questions do not present prudential ripeness concerns, and plaintiffs subject to proscriptive laws which mandate specified conduct subject to penalty for non-compliance present justiciable claims);[47] and *Reno v. Catholic Social Services*, 509 U.S. 43, 57 (1993) ("In some cases, the promulgation of a regulation will itself affect the parties concretely enough to satisfy . . . [ripeness]").[48]

U.S. 362, 371-373 (1976) (same). Here, Thomas and Baker have a specific plan to continue violating specific laws which presently harm them whether they act lawfully or unlawfully.

[47]In *Abbott* this Court also found unpersuasive the government's attempt to avoid justiciability by claiming that the most it would do at some uncertain date in the future was seek civil, rather than criminal, enforcement of the challenged law. 387 U.S. at 154. Moreover, here ASCHR does not have enforcement discretion as in *Abbott*, 387 U.S. at 151-152 (*Hotel, Motel*, 551 P.2d at 945), and Respondents have never disclaimed an intent to criminally prosecute. Furthermore, in *Abbott* this Court found it persuasive that the government, like Anchorage and Alaska, had spent considerable effort and money defending the challenged laws in the action at hand. *Id.* ("the Justice Department is defending this very suit"). As in *Abbott* this case presents pure legal questions.

[48]*Citing Abbott*, 387 U.S. at 148-149, 152-153; *Gardner v. Toilet Goods Ass'n, Inc.*, 387 U.S. 167, 171-172 (1967) (if proscriptive regulation is felt by plaintiff in every day affairs, then claim is presently ripe). *See also Steffel*, 415 U.S. at 459 (threats of enforcement and actual enforcement against another similar individual rendered action justiciable despite the fact that plaintiff ceased activity and did not continue); *Rail Reorganization Act Cases*, 419 U.S. at 143 and n. 29 (certain future injury from law supports finding of justiciability even though the exact date of the injury cannot be predicted); *EPA v. National Crushed Stone Ass'n*, 449 U.S. 64, 72 and n.12 (1980) (a facial challenge to the variance provision of an EPA pollution-control regulation was ripe even "prior to application of the regulation to a particular [company's] request for a variance"); *Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Dev. Comm'n*, 461 U.S. 190, 200-202 (1983) (Court permitted utilities to challenge a state law imposing a moratorium on the certification of nuclear power plants, even though the

II. THE NINTH CIRCUIT'S EN BANC DECISION CONFLICTS DIRECTLY AND IN PRINCIPLE WITH DECISIONS FROM NEARLY EVERY OTHER CIRCUIT COURT OF APPEAL

The Ninth Circuit's en banc decision in *Thomas* conflicts directly and in principle with decisions from nearly every other circuit court of appeal:[49] ***First Circuit***: *Rhode Island Assoc. of Real., Inc. v. Whitehorse*, 199 F.3d 26, 28 (1st Cir. 1999) (challenge to 20 year old law with criminal penalties was justiciable, despite the fact that no person had ever been charged or prosecuted under the law, simply because the Attorney General had not disclaimed enforcement and was statutorily mandated to enforce the law);[50] ***Second Circuit***:

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utilities had not yet applied for a certificate.); *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923) (case was justiciable despite the fact that the challenged law had not yet even gone into effect because the future injury was sufficiently predictable).

[49]As Justices O'Scannlain and Kleinfeld concluded below, the en banc decision conflicts with multiple prior panel decisions of the Ninth Circuit. *See Thomas*, 220 F.3d at 1142-1148; *San Diego County Gun Rights Comm'n v. Reno*, 98 F.3d 1121 (9th Cir. 1996); *Adult Video Ass'n v. Barr*, 960 F.2d 781 (9th Cir. 1992), *vacated sub nom. Adult Video Ass'n v. Reno*, 509 U.S. 917 (1993), *reinstated in relevant part*, 41 F.3d 503 (9th Cir. 1994); *San Francisco County Dem. Cen. Comm. v. Eu*, 826 F.2d 814 (9th Cir. 1987), *aff'd*, 489 U.S. 214 (1989); *Bland v. Fessler*, 88 F.3d 729 (9th Cir. 1996). *See also LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1153-1156 (9th Cir. 2000).

[50]*Contra*, *Thomas*, 220 F.3d at 1140-1141 (finding that Thomas and Baker face no threat of enforcement under a six year old interpretation of the law despite past government enforcement and statutory and judicial mandates to enforce the law without citizen complaint, and despite government refusal to disclaim enforcement). *See also Stern v. United*

Nutritional Hlt. All. v. Shalala, 144 F.3d 220, 226-227 (2nd Cir. 1998) (present injury in the form of 540 day delay in speech, *i.e.*, prior restraint, made claim justiciable regardless of any indication of any threat of enforcement in the event that the plaintiff had simply engaged in the proposed speech pending the government's evaluation of its claim);[51] ***Third Circuit***: *Presbytery of New Jersey v. Florio*, 40 F.3d 1454, 1458-1464 (3rd Cir. 1994) (clergyman's challenge to law which prohibited speech against homosexuality was justiciable, despite lack of indication as to when clergyman might violate law and be subject to civil enforcement and penalty provisions, simply because the government refused to disclaim an intent to enforce against clergyman);[52] ***Fourth Circuit***: *North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 709-711 (4th Cir. 1999) (group's challenge to 25 year old law which had never been applied to preclude the group's intended "issue advocacy" was justiciable, despite the government's disclaimer of an intent to enforce the law as to "issue advocacy," simply because the law existed and on its face presented possible enforcement threat);[53]

States Dist. Ct., 214 F.3d 4 (1st Cir. 2000).

[51] *Contra, Thomas*, 220 F.3d at 1139 (rejecting Thomas's and Baker's present religious injury from being required to violate the law or forfeit occupational liberty). *See also Frank v. United States*, 78 F.3d 815 (2nd Cir. 1996); *Brache v. County of Westchester*, 658 F.2d 47 (2nd Cir. 1981).

[52] *Contra, Thomas*, 220 F.3d at 1139-1141 (finding threat of civil enforcement not enough, ignoring criminal penalties, and despite past enforcement plus statutory and judicial mandate to enforce). *See also Artway v. Attorney General*, 81 F.3d 1235 (3rd Cir. 1996).

[53] *Contra, Thomas*, 220 F.3d at 1140-1141 (existence of proscriptive criminal law impacting religious landlords' First Amendment rights not enough for justiciability). *See also Doe v. Duling*, 782 F.2d 1202 (4th Cir. 1986).

Fifth Circuit: *Doe v. Beaumont Ind. Sch. Dist.*, 173 F.3d 274, 280-284 (5th Cir. 1999) (parents' claim challenging "Clergy in Schools" program was justiciable despite the fact that their children had never been selected to participate, only a small number of students per year were selected, and there was no way to predict if or when children might ever be selected to participate);[54] ***Sixth Circuit***: *National Rifle Ass'n of America v. MaGaw*, 132 F.3d 272, 282-288 (6th Cir. 1997) (gun manufacturers' challenge to law was justiciable despite lack of any present or imminent enforcement because present economic injury existed and "a citizen should be allowed to prefer 'official adjudication' to public disobedience");[55] ***Seventh Circuit***: *Hays v. City of Urbana*, 104 F.3d 102, 103-104 (7th Cir. 1997) (government's claim that it would not enforce law against landlords until it received evidence of some future violation on some uncertain future date did not defeat justiciability);[56] ***Eighth Circuit***: *Minnesota Citizens Concerned for Life v. FEC*, 113 F.3d 129, 130-131 and n. 4 (8th Cir. 1997)

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[54]*Contra*, *Thomas*, 220 F.3d at 1139-1141(ignoring Thomas's and Baker's past, present, and intended violations of laws, emphasizing instead the inability to predict precisely when or if unmarried couples might again seek to rent from Thomas and Baker, ignoring mandate for enforcement and proscriptive nature of criminal laws). *See also Ingebretsen v. Jackson Public Sch. Dist.*, 88 F.3d 274 (5th Cir. 1996); *Allendale Neighborhood Ass'n v. Austin Trans. Study Pol. Adv. Comm.*, 840 F.2d 258 (5th Cir. 1988).

[55]*Contra*, *Thomas*, 220 F.3d at 1138-1141 (trivializing enforcement history, ignoring Thomas's and Baker's present religious injury, and requiring Thomas and Baker to continue "public disobedience," *i.e.*, to violate religious beliefs, until government initiated enforcement, thereby confining Thomas and Baker to state adjudicatory proceedings).

[56]*Contra*, *Thomas*, 220 F.3d at 1139-1141 (generalized threat of prosecution or enforcement at uncertain future date when violation is detected will not support justiciability, ignoring proscriptive nature of law, past enforcement, mandate to enforce, and refusal to disclaim enforcement).

(finding that FEC's past defense of civil challenges to the law demonstrated FEC's willingness to enforce the law and presented plaintiff with sufficient threat of enforcement under proscriptive law carrying criminal and civil penalties);[57] ***Tenth Circuit***: *ACLU v. Johnson*, 194 F.3d 1149, 1153-1155 (10th Cir. 1999) (plaintiffs who had never violated law, which was not yet effective, who had never been prosecuted or threatened with prosecution, and whose conduct was not even clearly covered by law, presented justiciable claim principally because of "chilling");[58] ***District of Columbia Circuit***: *Navegar, Inc. v. United States*, 103 F.3d 994, 999-1001 (D.C. Cir. 1997) (justiciability existed for arms manufacturer to challenge law, despite the lack of any prosecution or threat of prosecution, simply because the proscriptive law clearly applied to the plaintiffs).[59]

III. THIS CASE INVOLVES IMPORTANT UNANSWERED QUESTIONS OF CONSTITUTIONAL LAW

This case presents important recurring questions of federal constitutional law regarding (1) the circumstances under which Article III allows a civil rights litigant to mount a First

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[57] *Citing FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) and *Faucher v. FEC*, 928 F.2d 468 (1st Cir. 1991) as evidence of FEC's intent to enforce law. *Contra*, *Thomas*, 220 F.3d at 1139-1141.

[58] "No one should have to go through being arrested for a [crime] . . ., publicly shamed, and pay for a defense only to have a court find that the newly enacted statute is unconstitutional." *Id.* at 1154. *Contra*, *Thomas*, 220 F.3d at 1139-1141. *See also Powder River Basin Res. Coun. v. Babbitt*, 54 F.3d 1477 (10th Cir. 1995).

[59] *Contra*, *Thomas*, 220 F.3d at 1139-1141.

Amendment pre-enforcement challenge to proscriptive laws carrying criminal and civil penalties; (2) what constitutes a credible threat of prosecution or enforcement for purposes of identifying Article III standing and ripeness; and (3) what constitutes a moribund law in desuetude as in *Poe*. As the divergence between the Ninth Circuit's *Thomas* decision and the decisions of other Circuit Courts of Appeal demonstrates, the line of reasoning which stretches from *Poe* to *Epperson* to *Bolton* to *Lyons* to *Booksellers* is not clear. This Court's direction and clarification is required so that lower courts may apply a uniform rule of law under Article III regarding standing and ripeness in First Amendment pre-enforcement actions.

CONCLUSION

For the reasons stated, the Court should grant the petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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Dated: October 2, 2000

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

KEVIN THOMAS and JOYCE BAKER,
Plaintiffs-Appellees,

v.

ANCHORAGE EQUAL RIGHTS COMMISSION and the MUNICIPALITY OF ANCHORAGE,
Defendants-Appellants,

v.

PAULA HALEY in her official capacity as the Executive Director of the Alaska State Commission for Human Rights,
Defendant.

No. 97-35220

D.C. Nos.
CV-95-0274-HRH
CV-95-0275-HRH

KEVIN THOMAS and JOYCE BAKER,
Plaintiffs-Appellees,

v.

ANCHORAGE EQUAL RIGHTS COMMISSION and the MUNICIPALITY OF ANCHORAGE,
Defendants,

v.

PAULA HALEY in her official capacity as the Executive Director of the Alaska State Commission for Human Rights,
Defendant-Appellant.

No. 97-35221

D.C. Nos.
CV-95-0274-HRH
CV-95-0275-HRH

OPINION

Appeals from the United States District Court
for the District of Alaska
H. Russel Holland, District Judge, Presiding

Argued and Submitted
July 13, 1998—Anchorage, Alaska
Opinion Filed January 14, 1999

Rehearing En Banc Granted and
Opinion Withdrawn October 19, 1999

Argued and Submitted
March 23, 2000—San Francisco, California

En Banc Opinion Filed August 4, 2000

Before: Procter Hug, Jr., Chief Judge, James R. Browning, Harry Pregerson, Diarmuid F. O'Scannlain, Ferdinand F. Fernandez, Pamela Ann Rymer, Andrew J. Kleinfeld, A. Wallace Tashima, Susan P. Graber, M. Margaret McKeown, and William A. Fletcher, Circuit Judges.

Opinion by Judge McKeown;
Concurrence by Judge O'Scannlain;
Dissent by Judge Kleinfeld

SUMMARY

Civil Litigation and Procedure/Standing

The court of appeals dismissed an action. Sitting en banc, the court held that a landlord's constitutional challenge to state and municipal housing laws is not ripe for review when the landlord has not been charged with violating the law, and there is no reasonable or imminent threat of enforcement.

Appellees Kevin Thomas and Joyce Baker individually owned residential rental properties in Anchorage, Alaska. Based on their religious beliefs, the landlords claimed that they had refused to rent to unmarried couples in the past and that they intended to continue to do so.

Both the State of Alaska and the City of Anchorage adopted laws that outlawed certain forms of discrimination in rental housing and prohibited refusal to rent on the basis of marital status. The laws prohibited landlords from inquiring about the marital status of prospective tenants or representing to prospective tenants that property is not available because of the tenants' marital status. The Anchorage ordinance prohibited publication or advertisement in the leasing of property that indicated a preference based on marital status.

The landlords filed an action against Paula Haley, the Executive Director of the Alaska State Commission for Human Rights, the Anchorage Equal Rights Commission, and the Municipality of Anchorage, seeking declaratory and injunctive relief. They claimed that the threat of enforcement of the marital status provisions of the anti-discrimination laws infringed their First Amendment rights to free exercise of religion and free speech.

The district court held that the landlords' claims were justiciable. The court concluded that the marital status provisions substantially burdened the landlords' free exercise rights, declared the provisions unconstitutional as applied, and permanently enjoined the State and the City from enforcing the provisions against the landlords. A divided panel of the Ninth Circuit Court of Appeals affirmed. The Ninth Circuit considered the matter en banc.

[1] The Constitution mandates that prior to the court's exercise of jurisdiction there must exist a constitutional case or controversy, that the issues presented are definite and concrete, not hypothetical or abstract. In assuring that this juris-

dictional prerequisite is satisfied, courts consider whether the plaintiffs face a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement, or whether the alleged injury is too imaginary or speculative to support jurisdiction.

[2] Neither the mere existence of a proscriptive statute nor a generalized threat of prosecution satisfies the case or controversy requirement. There must be a genuine threat of imminent prosecution.

[3] In evaluating the genuineness of a claimed threat of prosecution, courts look to whether the plaintiffs have articulated a concrete plan to violate the law in question, whether the prosecuting authorities have communicated a specific warning or threat to initiate proceedings, and the history of past prosecution or enforcement under the challenged statute.

[4] A general intent to violate a statute at some unknown date in the future does not rise to the level of an articulated, concrete plan. [5] The landlords' expressed intent to violate the law on some uncertain day in the future did not qualify as a concrete plan.

[6] When plaintiffs do not claim that they have ever been threatened with prosecution, that a prosecution is likely, or even that a prosecution is remotely possible, they do not allege a dispute susceptible to resolution by a federal court. No action had ever been brought against the landlords to enforce the marital status provision. There was no specific threat or even hint of future enforcement or prosecution. Neither landlord could identify any tenants turned away due to their marital status and no prospective tenant ever complained to the state or municipal authorities, formally or informally.

[7] In the twenty-five years that these housing laws had been on the books, the record did not indicate even a single criminal prosecution, and of the two reported instances of

civil enforcement, only one raised the issue of freedom of religion. At most, the past prosecution factor was a neutral one.

[8] Any threat of enforcement or prosecution against the landlords was not reasonable or imminent. The landlords did not confront a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement, and thus the dispute was not justiciable, because it was not ripe for court review.

[9] The prudential aspects of the ripeness analysis are guided by the consideration of the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.

[10] The manner in which the intersection of marital status discrimination and the First Amendment was presented, devoid of any specific factual context, rendered this case unfit for judicial resolution. A concrete factual situation is necessary to delineate the boundaries of what conduct the government may or may not regulate.

[11] The absence of any real or imminent threat of enforcement, particularly criminal enforcement, seriously undermined a claim of hardship. Forcing the State and the City to defend the housing laws in a vacuum and in the absence of any particular victims of discrimination, would cause the State and the City to suffer hardship if the case were adjudicated now.

Judge O'Scannlain concurred, writing separately to elaborate on the shift in the Ninth Circuit's ripeness and standing jurisprudence as set forth in the majority opinion.

Judge Kleinfeld dissented, writing that under Supreme Court law on standing, the landlords had standing and their case was ripe.

COUNSEL

Cliff J. Groh, Municipal Attorney's Office, Anchorage, Alaska, for appellants Anchorage Equal Rights Commission and Municipality of Anchorage.

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Steven T. McFarland, Center for Law & Religious Freedom, Annandale, Virginia, for amici curiae Christian Legal Society, National Council of Churches, Union of Orthodox Jewish Congregations, Church of Jesus Christ of Latter-Day Saints, National Association of Evangelicals, and Ethics and Religious Liberty Commission.

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Clyde J. Wadsworth, Heller Ehrman White & McAuliffe, San Francisco, California, for amicus curiae Lambda Legal Defense and Education Fund.

Michael P. Seng, Chicago, Illinois, for amicus curiae John Marshall Law School Fair Housing Legal Clinic.

Robert J. Barth, Oak Brook, Illinois, for amicus curiae Institute in Basic Life Principles.

Sevilla C.P. Claydon, Seattle, Washington, for amici curiae the Northwest Women's Law Center, American Muslim Council, California Women's Law Center, Connecticut Women's Education and Legal Fund, the Feminist Majority Foundation, National Center for Lesbian Rights, National Council of Jewish Women, Women's Law Center of Maryland.

David K. Flynn, Department of Justice, Washington, D.C., for amicus curiae United States.

Timothy Dowling, Washington, D.C., for amicus curiae Community Rights Counsel.

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David P. Enzminger, O'Melveny & Myers LLP, Los Angeles, California, for the Anti-Defamation League of B'nai B'rith.

Eric Grant, Sacramento, California, for amicus curiae Pacific Legal Foundation.

OPINION

McKEOWN, Circuit Judge:

This is a case in search of a controversy. Several landlords mount a First Amendment free exercise of religion and free speech challenge to the Alaska housing laws prohibiting discrimination on the basis of marital status. We do not address this constitutional question, however, because this pre-enforcement challenge presents a threshold issue of justiciability. No prospective tenant has ever complained to the landlords, let alone filed a complaint against them. Neither the Alaska State Commission for Human Rights nor the Anchor-

age Equal Rights Commission has ever initiated an investigation into the landlords' rental practices or commenced a civil enforcement action or criminal prosecution under the challenged laws. No violation of the laws is on the horizon and no enforcement action or prosecution is either threatened or imminent. Indeed, the principal enforcement agencies had never even heard of these landlords before they filed this action. Simply put, at this stage the dispute is purely hypothetical and the injury is speculative. Whether viewed through the lens of standing or ripeness, resolution of the First Amendment issues is premature. Thus, dismissal of this action is required.[1]

BACKGROUND

Kevin Thomas and Joyce Baker[2] (the "landlords") individually own residential rental properties in Anchorage, Alaska. Both are devout Christians who are committed to carrying out their religious faith in all aspects of their lives, including their commercial activities as landlords. Central to their faith is a belief that cohabitation between an unmarried man and an unmarried woman is a sin. The landlords also believe that facilitating the cohabitation of an unmarried couple is tantamount to committing a sin themselves. Based on this religious belief, the landlords claim that they have refused to rent to unmarried couples in the past and that they intend to continue to do so in the future.

Both the State of Alaska and the City of Anchorage have adopted laws that outlaw certain forms of discrimination in

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[1]Contrary to the view expressed in the concurrence, our decision neither shuts the door to pre-enforcement challenges to laws that allegedly infringe upon constitutional rights, nor does it establish a new approach to justiciability, which under our precedent requires a balancing of several factors. Rather, our decision remains true to our precedent, all of which remains good law.

[2]Gary Baker, Joyce Baker's husband, is a party to this action but did not participate in this appeal.

rental housing and prohibit any refusal to rent on the basis of marital status. The Alaska statute makes it unlawful "to refuse to sell, lease or rent . . . real property to a person because of . . . . marital status." Alaska Stat. § 18.80.240(1), (2). The Anchorage ordinance is parallel in this respect. *See* Anchorage Mun. Code § 5.20.020(A), (B). The laws further prohibit landlords from inquiring about the marital status of prospective tenants or representing to prospective tenants that property is not available because of the tenants' marital status. *See* Alaska Stat. § 18.80.240(3), (5); Anchorage Mun. Code § 5.20.020(C), (E). Finally, the ordinance, but not the state statute, prohibits publication or advertisement in the leasing of property that indicates a preference based on marital status. *See* Anchorage Mun. Code § 5.20.020(G). The Alaska Supreme Court has construed the marital status provisions of the laws to prohibit landlords from refusing to rent their properties to unmarried couples. *See Foreman v. Anchorage Equal Rights Comm'n*, 779 P.2d 1199, 1202 (Alaska 1989).

The landlords brought this action against Paula Haley, the Executive Director of the Alaska State Commission for Human Rights, the Anchorage Equal Rights Commission, and the Municipality of Anchorage, seeking declaratory and injunctive relief under 42 U.S.C. § 1983 and 28 U.S.C. § 2201. They claimed that the threat of enforcement of the marital status provisions of the anti-discrimination laws infringed their First Amendment rights to free exercise of religion and free speech. Specifically, they argued that their religious beliefs precluded them from renting to unmarried couples and that the laws restricted their ability to communicate those beliefs through advertising or by inquiring about the marital status of prospective tenants. On cross-motions for summary judgment, the district court held that the landlords' claims were justiciable. In a subsequent order, the court concluded that the marital status provisions substantially burdened the landlords' free exercise rights. The court declared the provisions unconstitutional *as applied* and permanently enjoined the State and the City from enforcing the provisions

against the landlords. A divided panel of this court affirmed, and we voted to consider this matter en banc. *See Thomas v. Anchorage Equal Rights Comm'n*, 165 F.3d 692, *withdrawn and reh'g en banc granted*, 192 F.3d 1208 (9th Cir. 1999).

DISCUSSION

This case presents a threshold question of ripeness. The Supreme Court instructs that ripeness is "peculiarly a question of timing," *Regional Rail Reorg. Act Cases*, 419 U.S. 102, 140 (1974), designed to "prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148 (1967). Our role is neither to issue advisory opinions nor to declare rights in hypothetical cases, but to adjudicate live cases or controversies consistent with the powers granted the judiciary in Article III of the Constitution. *See* U.S. Const. art. III. Although ripeness, like other justiciability doctrines, is "not a legal concept with a fixed content or susceptible of scientific verification," *Poe v. Ullman*, 367 U.S. 497, 508 (1961), the Supreme Court has observed that the doctrine "is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction," *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 57 n.18 (1993). As we noted in *Portman v. County of Santa Clara*, 995 F.2d 898, 902 (9th Cir. 1993), "the ripeness inquiry contains both a constitutional and a prudential component." We consider each component in turn.

A. Constitutional Component

The constitutional component of the ripeness inquiry is often treated under the rubric of standing and, in many cases, ripeness coincides squarely with standing's injury in fact prong.[3]

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[3]The "irreducible constitutional minimum of standing contains three elements:" (1) injury in fact; (2) causation; and (3) likelihood that a favorable decision will redress the injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

Sorting out where standing ends and ripeness begins is not an easy task. Indeed, because the focus of our ripeness inquiry is primarily temporal in scope, ripeness can be characterized as standing on a timeline. *Cf. United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 397 (1980) (describing mootness as "the doctrine of standing set in a time frame.") (quoting Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 Yale L.J. 1363, 1384 (1973)). The overlap between these concepts has led some legal commentators to suggest that the doctrines are often indistinguishable. *See, e.g.*, Erwin Chemerinsky, *A Unified Approach to Justiciability*, 22 Conn. L. Rev. 677, 681 (1990). And, in "measuring whether the litigant has asserted an injury that is real and concrete rather than speculative and hypothetical, the ripeness inquiry merges almost completely with standing." Gene R. Nichol, Jr., *Ripeness and the Constitution*, 54 U. Chi. L. Rev. 153, 172 (1987).

[1] Whether the question is viewed as one of standing or ripeness, the Constitution mandates that prior to our exercise of jurisdiction there exist a constitutional "case or controversy," that the issues presented are "definite and concrete, not hypothetical or abstract." *Railway Mail Ass'n v. Corsi*, 326 U.S. 88, 93 (1945). In assuring that this jurisdictional prerequisite is satisfied, we consider whether the plaintiffs face "a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement," *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979), or whether the alleged injury is too "imaginary" or "speculative" to support jurisdiction. *Id.* We need not delve into the nuances of the distinction between the injury in fact prong of standing and the constitutional component of ripeness: in this case, the analysis is the same.

[2] We have held that neither the mere existence of a proscriptive statute nor a generalized threat of prosecution satisfies the "case or controversy" requirement. *See, e.g., San Diego County Gun Rights Comm. v. Reno*, 98 F.3d 1121,

1126-27 (9th Cir. 1996). In a somewhat circular argument, the landlords contend that they are presently injured because they must violate the housing laws to remain true to their religious beliefs, even though their beliefs counsel against violating secular law. This argument is essentially another way of saying that the mere existence of a statute can create a constitutionally sufficient direct injury, a position that we have rejected before and decline to adopt now. *See id.* (" '[t]he mere existence of a statute . . . is not sufficient to create a case or controversy within the meaning of Article III.' " (quoting *Stoianoff v. Montana*, 695 F.2d 1214, 1223 (9th Cir. 1983))). Rather, there must be a "genuine threat of imminent prosecution." *Id.* at 1126.

[3] In evaluating the genuineness of a claimed threat of prosecution, we look to whether the plaintiffs have articulated a "concrete plan" to violate the law in question, whether the prosecuting authorities have communicated a specific warning or threat to initiate proceedings, and the history of past prosecution or enforcement under the challenged statute. *Id.* at 1126-27. Applying these three factors here, we conclude that the landlords' claimed injury—their fear of enforcement or prosecution—fails the constitutional component of the ripeness inquiry.[4]

[4] Turning to the first prong, it is clear that even if "concrete plan" does not mean cast in stone, the Constitution

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[4]The penalties for violating the Alaska statute are both criminal and civil in nature. Any individual who "willfully engages in an unlawful discriminatory conduct prohibited by this chapter" is guilty of a misdemeanor and may upon conviction be subject to a $500 fine or up to 30 days in jail. Alaska Stat. § 18.80.270. There are no criminal penalties for a violation of the ordinance. *See* Anchorage Mun. Code § 5.30.070 (criminal penalties limited to willful interference with commission's investigation). The civil sanctions for violating the statute and the ordinance are identical. The Commission may seek injunctive relief, initiate an investigation, hold a hearing, and/or issue an appealable compliance order. *See* Alaska Stat. § 18.80.100-.145; Anchorage Mun. Code § 5.30.010-.090.

requires something more than a hypothetical intent to violate the law. Thomas and Baker claim that they have refused to rent to unmarried couples in the past, yet they cannot say when, to whom, where, or under what circumstances. They pledge their intent to do so in the future, yet again they cannot specify when, to whom, where, or under what circumstances. A general intent to violate a statute at some unknown date in the future does not rise to the level of an articulated, concrete plan.

[5] In *San Diego County*, we held that a similarly expressed "intent" to engage in conduct proscribed by the Crime Control Act failed to demonstrate that the claimed injury — the threat of prosecution — was reasonable. *Id.* at 1126-27. " '[S]uch 'some day' intentions — without . . . specification of when the some day will be — do not support a finding of the 'actual or imminent' injury that our cases require.' " *Id.* at 1127 (quoting *Lujan*, 504 U.S. at 564). The landlords' expressed "intent" to violate the law on some uncertain day in the future — if and when an unmarried couple attempts to lease one of their rental properties — can hardly qualify as a concrete plan. Because their free speech claims are similarly contingent on such "some day" intentions and are inextricably linked with the prohibited conduct, they suffer the same infirmity.[5]

[6] As for the second factor, a specific threat of enforcement, the record is devoid of any threat — generalized or specific — directed toward Thomas and Baker. Although we do not always require plaintiffs to await arrest or prosecution before entertaining a challenge to the constitutionality of a

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[5]The landlords also contend that the City's prohibition on any advertising referencing a marital status preference violates their right to free speech. *See* Anchorage Mun. Code § 5.20.020(G). The landlords, however, have never advertised or published such a reference in the past in connection with their rental real estate activities. Nor have they expressed any intent to do so in the future. On this record, the alleged free speech violation does not rise to the level of a justiciable controversy.

statute, *see Babbitt*, 442 U.S. at 298, the threat of enforcement must at least be "credible," not simply "imaginary or speculative." *Id.* "When plaintiffs 'do not claim that they have ever been threatened with prosecution, that a prosecution is likely, or even that a prosecution is remotely possible,' they do not allege a dispute susceptible to resolution by a federal court." *Id.* at 298-99 (quoting *Younger v. Harris*, 401 U.S. 37, 42 (1971)). No action has ever been brought against the landlords to enforce the marital status provision. There has been no specific threat or even hint of future enforcement or prosecution. Nor could there be, as neither Thomas nor Baker can identify any tenants turned away due to their marital status and no prospective tenant has ever complained to the state or municipal authorities, formally or informally. In fact, appellant Haley never heard of either Thomas or Baker before this action was filed. The threat of enforcement based on a future violation — which may never occur — is beyond speculation.

[7] The third factor to be considered is the history of enforcement under the statute. In the twenty-five years that these housing laws have been on the books, the record does not indicate even a single criminal prosecution, and of the two reported instances of civil enforcement, only one raised the freedom of religion issue presented here. *See Swanner v. Anchorage Equal Rights Comm.*, 874 P.2d 274 (Alaska 1994) (holding that enforcement of the anti-discrimination provisions did not violate right to free exercise of religion); *Foreman v. Anchorage Equal Rights Comm.*, 779 P.2d 1199 (Alaska 1989) (holding that the marital status provision was intended to protect unmarried couples).[6] These enforcement actions stemmed from complaints filed by actual, prospective

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[6]Notably, the opinion does not reveal that the Foremans' refusal to comply with the laws was premised on their religious beliefs. Moreover, appellant Haley states in her affidavit that she was employed as a staff attorney with the Anchorage Equal Rights Commission at the time the *Foreman* case was pending and, based on her familiarity with the case, attests that it did not involve the freedom of religion issues raised by the landlords here.

tenants. Unlike other cases in which we have held that the government's "active enforcement" of a statute rendered the plaintiff's fear of prosecution reasonable, *Adult Video Ass'n v. Barr*, 960 F.2d 781, 784 (1992), *rev'd on other grounds*, 509 U.S. 917 (1993), *adopted in pertinent part sub nom. Adult Video Ass'n v. Reno*, 41 F.3d 503 (9th Cir. 1994), here the record of past enforcement is limited, was civil only, not criminal, and in any event was in each case precipitated by the filing of complaints by potential tenants.[7] In *Swanner* and *Foreman*, the enforcement agency was faced with real people involved in a real controversy, not hypothetical requests for an advisory opinion. Indeed, the agencies are now surely aware of these landlords and still have launched no enforcement proceedings. At most, the past prosecution factor is a neutral one in this case.

[8] Considering the applicable factors, we hold that any threat of enforcement or prosecution against the landlords in this case — though theoretically possible — is not reasonable or imminent. The asserted threat is wholly contingent upon the occurrence of unforeseeable events: whether the landlords retain their rental properties; whether an unmarried couple will seek to lease available property; whether the couple, having been denied tenancy, will file a complaint or communicate the alleged discrimination to the enforcement agencies; and whether the enforcement agencies will decide to prosecute. The landlords do not at this time confront "a realistic danger

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[7]We grant Thomas and Baker's Motion Requesting the Court of Appeals to Take Judicial Notice of an administrative complaint filed with the Alaska State Commission for Human Rights in January 1997. *See Alaska State Comm. for Human Rights ex rel. Kristiann Kutzler v. Alaska Pacific Univ.*, ASCHR No. C-96-010 (Alaska State Commission for Human Rights). The complaint apparently involves married student housing at a private school. Although we grant the motion, the documents are of little import to the outcome of this appeal. All we know is that a complaint was filed. We have no record of actual facts, the course of the proceeding, if any, or the ultimate disposition, if any. And, all the documents proffered are now more than three years old.

of sustaining a direct injury as a result of the statute's operation or enforcement," *Babbitt*, 442 U.S. at 298, and thus this "dispute is not justiciable, because it is not ripe for court review." *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 732 (1998).

B. Prudential Component

[9] Even were we to conclude that Thomas and Baker present a ripe case or controversy in the constitutional sense, we would decline to exercise jurisdiction under the prudential component of the ripeness doctrine. In evaluating the prudential aspects of ripeness, our analysis is guided by two overarching considerations: "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Laboratories*, 387 U.S. at 149; *see also Hodgers-Durgin v. De La Vina*, 199 F.3d 1037, 1040-41 (9th Cir. 1999) (en banc); *San Diego County*, 98 F.3d at 1132.

[10] The manner in which the intersection of marital status discrimination and the First Amendment is presented here, devoid of any specific factual context, renders this case unfit for judicial resolution. The record before us is remarkably thin and sketchy, consisting only of a few conclusory affidavits. "A concrete factual situation is necessary to delineate the boundaries of what conduct the government may or may not regulate." *San Diego County*, 98 F.3d at 1132. And yet, the landlords ask us to declare Alaska laws unconstitutional, in the absence of any identifiable tenants and with no concrete factual scenario that demonstrates how the laws, as applied, infringe their constitutional rights. This case is a classic one for invoking the maxim that we do not decide " 'constitutional questions in a vacuum.' " *American-Arab Anti-Discrimination Comm. v. Thornburgh*, 970 F.2d 501, 511 (9th Cir. 1992) (quoting *W.E.B. DuBois Clubs of America v. Clark*, 389 U.S. 309, 312 (1967) (per curiam)).

We disagree with the landlords that this case is purely legal. Unlike the situation in *Abbott Laboratories*, in which the parties agreed that the constitutionality of the challenged regulation boiled down to a question of congressional intent, the issues presented in the landlords' pre-enforcement challenge here are not purely legal. *See San Diego County*, 98 F.3d at 1132 (stating that case "devoid of any factual context whatsoever" is not fit for review); *American-Arab*, 970 F.2d at 510-11 (stating that case "with many unknown facts" and a "sketchy record" is not fit for review). Just as a challenge involving the Sixth Amendment right to counsel was rejected on ripeness grounds in *Portman* because the "entire argument about the effect of the . . . statute rests upon hypothetical situations and hypothetical clients," 995 F.2d at 903, so too the landlords' claim rests upon hypothetical situations with hypothetical tenants. Similar to the pre-enforcement challenge to the constitutionality of gun control legislation in *San Diego County* and the challenge to the constitutionality of certain immigration provisions in *American-Arab*, the First Amendment challenge presented in this case requires an adequately developed factual record to render it ripe for our review. That record, at this point, does not exist.[8]

[11] Turning to the second consideration — the hardship to the parties if jurisdiction is withheld — the landlords have not persuaded us that any hardship will result from deferring resolution of this matter to a time when a real case arises. The hardship analysis of our ripeness jurisprudence dovetails, in part, with the constitutional consideration of injury. Although the constitutional and prudential considerations are distinct, the absence of any real or imminent threat of enforcement,

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[8]To highlight one example, it is unclear whether the landlords' view on appropriate tenants extends to female roommates, married individuals not living with their spouses, a brother and a sister, a disabled female with a male caretaker, a single father with a female nanny, and so on. Without a more fully developed record, any decision would be wholly advisory. We cannot judge the outer bounds of the application of our decision without knowing the particular contours of the case or controversy.

particularly criminal enforcement, seriously undermines any claim of hardship. Moreover, by being forced to defend the housing laws in a vacuum and in the absence of any particular victims of discrimination, the State and the City would suffer hardship were we to adjudicate this case now.

Prudential considerations of ripeness are discretionary, and here we exercise our discretion to decline jurisdiction over a dispute that is too remote. At this juncture, neither landlord has been charged with violating either the statute or the ordinance. Nor is there any reasonable or imminent threat of enforcement. If and when an enforcement action is brought against Thomas or Baker, that will be the appropriate time to raise the constitutional arguments. Postponing judicial review to a time when the landlords actually face an enforcement proceeding, or at least an imminent threat of one, poses insufficient hardship to justify the exercise of jurisdiction now.

CONCLUSION

Because this action is not ripe for judicial review, we vacate the district court's decision and remand this case to the district court with the instruction to dismiss the action without prejudice.

O'SCANNLAIN, Circuit Judge, concurring:

Today, the court, sitting en banc, commendably reshapes this circuit's overly permissive jurisprudence of ripeness and standing by tightening the requirements for bringing lawsuits. These requirements are born of Article III of the Constitution; the same provision that grants judges their authority constrains its use. Standing and ripeness doctrines ensure that an adequate factual and legal context will sharpen and cabin judicial decision-making. They preserve the separation of powers and safeguard democracy by constraining the author-

ity of the unelected judiciary to pass judgment on the acts of legislatures. Thus, I am delighted to concur in the court's admirable retreat to more appropriate restraint, but write separately to make explicit what the court fails to elaborate.

I

The new rule of ripeness and standing promulgated today boils down to this: potential litigants aggrieved by existing law—in this case, a state statute and a municipal ordinance—will be virtually unable to bring pre-enforcement challenges in this circuit even in the most sensitive First Amendment context where the laws allegedly burden their freedom of speech and the free exercise of their religion. A pre-enforcement challenge is no longer available despite averments of having broken the law in the past and explicit intent to violate the law in the future. A pre-enforcement challenge no longer lies even when the statute has been enforced by the state Supreme Court within the previous five years and is currently being enforced against others similarly situated.

Under our case law as it existed until today, these landlords' case was ripe. When the matter was before the three-judge panel of which I was a member, we applied the letter and the spirit of our precedents, *see Thomas v. Anchorage Equal Rights Comm'n*, 165 F.3d 692, 697-700 (9th Cir. 1999), *withdrawn by* 192 F.3d 1208, in concluding that the pre-enforcement challenge before us, based on the First Amendment, met all the requirements for justiciability. Now the en banc court, as is its prerogative, reverses and curtails sharply, sub silentio yet most appropriately, several of these precedents. The most significant changes meriting emphasis relate to two factors in the justiciability inquiry: whether a plaintiff sufficiently alleges plans to violate the law and whether a plaintiff has demonstrated an adequate history of enforcement of the law. Notwithstanding suffering reversal of an authored opinion, I concur in the court's new approach to justiciability

because I think it is useful to refine the rules governing who can challenge what when in this circuit.

II

The majority's legal analysis quite properly begins by asking whether the landlords, Kevin Thomas and Joyce Baker, face a "realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979). Where, as here, no prosecution is pending, the controversy is ripe if they face a "reasonable threat of prosecution." *Ohio Civil Right Comm'n v. Dayton Christian Schs., Inc.*, 477 U.S. 619, 625 n.1 (1986). The landlords must demonstrate that prosecution is at least "remotely possible" and "not imaginary or wholly speculative." *Babbitt*, 442 U.S. at 299, 302.

Following our decision in *San Diego County Gun Rights Commission v. Reno*, 98 F.3d 1121 (9th Cir. 1996), we look first to see if the landlords have articulated "concrete plans to violate the" law. *Id.* at 1126-27. Here, the court concludes that the landlords have not done so, finding the present situation to be virtually identical to the one in *San Diego County*. But the situations do differ in one key respect, and, because they do, the court today cuts back on standing more than it openly admits.

San Diego County involved a challenge to the Violent Crime Control and Law Enforcement Act, which restricts the manufacture, possession, and transfer of semiautomatic weapons. *See id.* at 1124. It too was a pre-enforcement challenge by several groups and individuals who alleged that they wished to engage in activities prohibited by the law. *See id.* We concluded that the plaintiffs did not have standing because they had "not articulated concrete plans to violate the" law. *Id.* at 1127. It was not enough for the plaintiffs to state that they "wish and intend to engage in activities prohib-

ited by" the law. *Id.* The court declares that the same is true here.

By not acknowledging the differences in the cases, the court's opinion fails to make explicit that it is extending and expanding our holding in *San Diego County*, not merely applying it. The plaintiffs in that case never alleged that they violated the law in the past. They never articulated specific plans to violate it in the future. *See id.* (contrasting the allegations of the plaintiffs in *Babbitt*, 442 U.S. at 303). Yet, "the acts necessary to make plaintiffs' injury—prosecution under the challenged statute—materialize [were] almost entirely within plaintiffs' own control." *Id.*

Unlike the plaintiffs in *San Diego County*, Thomas and Baker allege that they have violated the law in the past by turning away unmarried couples. Unlike the plaintiffs in *San Diego County*, the landlords allege that they "would continue to engage in acts regulated under the challenged legislation." *Id.* Unlike the plaintiffs in *San Diego County*, whether the landlords can violate the law is *not* "almost entirely within [their] own control." *Id.* As landlords, they cannot control when an unmarried couple will come to them seeking an apartment. If they cannot control when the unmarried couples will come, they cannot control when they will violate the law by turning them away. Thus the most that they can do is to state that they plan to violate the law the very next time they have the opportunity to do so. This Thomas and Baker have done. Today, the court demands more; it requires that plaintiffs "specify when, to whom, where, or under what circumstances."[1] But given that the circumstances are not all in their control, one would expect that the landlords have done all that they can.

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[1]Of course, the landlords have answered several of the court's questions: "to whom?"—unmarried couples living together; "where?"—at the apartments the landlords own; "under what circumstances?"—when asked to rent an apartment to two unmarried individuals who are physically intimate. Thus, the only remaining issue is when.

The court, therefore, does much more than apply *San Diego County*—it expands its holding to a new dimension. The court denies standing where plaintiffs do not control when the violation occurs, but have done all they can to violate the law. Even in the context of First Amendment challenges, litigants who articulate concrete plans to violate the law will not have done enough to meet the requirements for ripeness and standing. A declaratory action, which by its very nature occurs before the plaintiffs are charged with breaking the law, is no longer viable in this circuit when violating the law depends in part on the actions of others. After today, plaintiffs in these situations will have to wait until they get caught, and then challenge the law as a defense to their prosecution. *San Diego County* has been expanded to that logical extent, and I concur.

III

Next, the court quite properly evaluates whether the statute has been enforced in the past, but in answering that question makes new law.

A

While these landlords have not yet been specifically targeted, the state has enforced the prohibition of discrimination against unmarried couples in at least two recent published cases: *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274 (Alaska 1994), and *Foreman v. Anchorage Equal Rights Comm'n*, 779 P.2d 1199 (Alaska 1989). Given that these two cases were decided by the Supreme Court of Alaska, it is safe to assume that other enforcement actions have recently been brought as well.[2]

Cryptically, the majority refers to the "notable" fact that the

[2]The Alaska State Commission on Human Rights is presently engaged in enforcement action against Alaska Pacific University for alleged discrimination in housing against unmarried couples.

Foreman opinion does not reveal whether the Foremans were motivated by their religious beliefs. I am not sure what is notable about this. The statute at issue forbids discrimination against unmarried couples regardless of motive. Until today, we have not held that only prior prosecutions involving the same stated defense rationale as that expressed by the current challenger qualify as prior enforcement actions. Such a policy would produce anomalies, and fortunately the majority appears to stop short of endorsing it here.

B

The court's opinion also overrules, sub silentio, parts of three of our prior decisions: *Adult Video Ass'n v. Barr*, 960 F.2d 781, 786 (9th Cir. 1992), *vacated sub nom. Adult Video Ass'n v. Reno*, 509 U.S. 917 (1993), *reinstated in relevant part*, 41 F.3d 503 (9th Cir. 1994); *San Francisco County Democratic Central Comm. v. Eu*, 826 F.2d 814 (9th Cir. 1987), *aff'd*, 489 U.S. 214 (1989); and *Bland v. Fessler*, 88 F.3d 729 (9th Cir. 1996). It also casts doubt on the continuing validity of several of our other precedents. Again, I am pleased to concur in this clarification of the requirements for ripeness and standing.

1

The court asserts, in a passing reference to *Adult Video*, that the history of "active enforcement" of the statute at issue there distinguishes that case from the present one.[3] That is simply not the case. *Adult Video* and the court's opinion in this case are inconsistent, and as the court today sits en banc, *Adult* Video has been overruled to that extent.

In *Adult Video*, a producer of sexually explicit videotapes

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[3]One wonders if Alaskans will be surprised when they read that the court operates under the impression that the state authorities almost never enforce the antidiscrimination law they passed.

challenged the facial constitutionality of several provisions of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-1968, as applied to obscenity offenses. *See* 960 F.2d at 783-84. Specifically, Adult Video challenged, on First Amendment grounds, RICO's authorization of pre-trial seizures and post-trial forfeiture. *See id.* at 784. Because the government had not prosecuted it, Adult Video had to show a reasonable threat of prosecution in order to establish standing and ripeness. Specifically, as Adult Video challenged "more than the Constitutionality of RICO obscenity prosecutions in and of themselves," it had to demonstrate that it "face[d] a reasonable threat of pre-trial seizure or post-conviction forfeiture." *Id.* at 785. The "active prosecution" which the court's opinion mentions referred only to RICO generally, not to the two specific provisions of the act Adult Video challenged—pre-trial seizures and post-trial forfeitures. *See id.*

Pursuing the justiciability inquiry, we noted first that the government never "conducted pre-trial seizures in RICO obscenity cases" and that it had disclaimed any interest in ever doing so. *Id.* Yet, we concluded that Adult Video had standing to challenge *that provision* of the act. *See id.* Why? Because "the statute authorizes such seizures", "no formal policy of the Department of Justice prohibits its prosecutors or officers from pursuing pre-trial seizures, and enforcement practices may change at any time in any case. Consequently, Adult Video's apprehension concerning pre-trial seizure is reasonable. Therefore, Adult Video does have standing to litigate this claim." *Id.* That was it.

There is no principled distinction between *Adult Video* and the facts of this case, and therefore today's en banc opinion prevails. Here, the landlords challenge a statute that prohibits the conduct in which they engage. No formal policy of the state or the city prohibits their prosecutors from enforcing the statute to prevent discrimination against unmarried couples. In fact, the state's highest court has ruled that the statute places

an affirmative duty on the state human rights commission to root out discrimination. *See Hotel, Motel, Restaurant, Constr. Camp Employees & Bartenders Union v. Thomas*, 551 P.2d 942, 945 (Alaska 1976) ("[T]he legislature intended the Commission to be more than a simple complaint-taking bureau; the statutory scheme constitutes a mandate to the agency to seek out and eradicate discrimination in . . . the sale, lease, or rental of real property."). In addition, the state and city have enforced the laws and are currently doing so. Still, the court concludes that is not enough because previous prosecutions under the statute occurred only after complaints. Here no one has complained of the landlords' practices. In *Adult Video* we discounted the relevance of past prosecution practices by stating that such practices "may change at any time in any case." 960 F.2d at 785. I am pleased that, after today, prosecution practices are once again relevant.

In sum, here we have a statute that prohibits the conduct engaged in and we have the absence of any policy against enforcement. The *Adult Video* panel required no more, but the en banc court does. *Adult Video* has been overruled to that extent, and I concur.

2

Nor can the court's conclusion that the landlords' claims are not ripe despite the history of at least two enforcement actions be entirely reconciled with *Eu*. In that case, we held that a pre-enforcement challenge to provisions of the California Elections Code was justiciable despite the fact that the law had never been enforced. *See* 826 F.2d at 821-23. In that case, we "found justiciability notwithstanding a record of non-enforcement because . . . the record did not show that the statutes had been 'commonly and notoriously' violated." *Id.* at 822 (quoting *Poe v. Ullman*, 367 U.S. 497, 502 (1961) (holding that a challenge to a statute banning contraception was not justiciable because the law had not been enforced in seventy-

five years)). It was enough in *Eu* that the law had not fallen into desuetude.

In this case too, it is clear that the statute has not fallen into desuetude. Although the landlords allege that they have violated the statute by turning away unmarried couples, there is no indication in the record that the statute is "commonly and notoriously violated." *Id.* Nor is there a lack of enforcement, which, coupled with open violations of the act, would lead one to conclude that the state had no intention of enforcing the law. To the contrary, there is evidence of two enforcement actions that have gone all the way up to the Supreme Court of Alaska and the consequent reasonable likelihood of many more. In *Eu*, this was sufficient to grant the plaintiffs standing and make the plaintiffs' claims ripe. The court's opinion makes it clear that this will no longer be enough. *Eu* has been overruled to that extent, and I concur.

3

In *Bland*, telephone operators and advertisers challenged the constitutionality of a civil statute regulating telephone automatic dialing and announcing devices ("ADADs"). *See* 88 F.3d at 730-31. As the state had not prosecuted the plaintiffs, this was a pre-enforcement challenge. In contrast to the present case, where the state has undertaken at least two prosecutions, in *Bland*, the state "had never enforced the civil statute against anyone" in six years. *Id.* at 737. Nevertheless, we stated:

> "[w]e are not troubled by the pre-enforcement nature of this suit. The State has not suggested that the newly enacted law will not be enforced, and we see no reason to assume otherwise. We conclude that plaintiffs have alleged an actual and well-founded fear that the law will be enforced against them. Further, the alleged danger of this statute is, in large

> measure, one of self-censorship; a harm that can be realized even without actual prosecution."

Id. (quoting *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 393 (1988)). In *Bland*, the state had "not stated affirmatively that [it] would not enforce the civil statute," although it had stated that the Attorney General's office had "not brought or indicated that it would bring any action" under the statute. *Id.* & n.12. This placed the plaintiff "between the rock of foregoing the use of his ADADs and the hard place of violating the law." *Id.*

In this case, the state and the city have not only not disclaimed any interest in effecting the statute, but have actually enforced it. Indeed they are under an affirmative duty to do so. In this case, as in *Bland*, the landlords find themselves between the rock of violating their religious beliefs and the hard place of violating the law.[4] In this case, as in *Bland*, the plaintiffs allege that they must alter their conduct in order to comply with the statute. What was enough for standing in *Bland* is no longer enough now.[5] *Bland* has been overruled to

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[4]In this case, the landlords find themselves in an even more difficult dilemma as the very same beliefs that command that they not rent to unmarried couples command that they follow the law. The court finds this argument "circular," stating that it is nothing more than an attempt to evade the principle that mere existence of a statute does not suffice to give plaintiffs standing. I cannot concur in this dismissive interpretation of the landlords' religious beliefs. This is in fact a situation unlike any other. To my knowledge, no producer of obscenity has yet to claim that the same impulses that lead him to produce obscenity require him to follow a law prohibiting such material. Nor did the gun distributors in *San Diego County* claim that their desire to follow the gun laws and their desire to distribute guns sprang from the same beliefs. Thus the landlords present a truly unique situation to which the court's opinion gives short shrift.

[5]In *Bland* we also refused to draw any line between criminal or civil enforcement. *See* 88 F.3d at 736 n.11. Unlike *Bland*, the court today appears to draw this distinction. In fact, the court goes one step further and finds it relevant that the criminal enforcement provisions have not, to our knowledge, been used. I am pleased that from now on in deciding justiciability we will take into account both the penalties authorized by the statute and the history of their use.

that extent, and I concur.[6]

IV

The court begins its opinion by stating that this is a case in search of a controversy. One wonders, rather, whether this is a court afraid of a case. No court would eagerly enter the jurisprudential thicket surrounding the intersection of First Amendment free exercise concerns and civil rights created by fair housing laws. Thus we postpone, perhaps serendipitously, but ineluctably, definitive application of *Employment Division v. Smith*, 494 U.S. 872 (1990), and its newly developed hybrid rights doctrine to what had been deemed a live controversy arising in one of the states of this circuit. As our three-judge panel opinion and dissent demonstrate, together with the decisions of our sister circuits, *Smith* itself is fraught with complexity both in doctrine and in practice. *See Thomas*, 165 F.3d at 700-18 (requiring that a free exercise claim based on the hybrid rights exception must include a colorable claim of infringement of a companion right), 722-27 (Hawkins, J., dissenting) (expressing doubt as to "whether the hybrid rights exception even exists"); *Swanson v. Guthrie Indep. Sch. Dist. No. I-L*, 135 F.3d 694, 700 (10th Cir. 1998) (requiring that a free exercise claim based on the hybrid rights exception must include at least a colorable claim of infringement of a companion right); *EEOC v. Catholic University of America*, 83

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[6]The court's opinion casts doubt as well on the continuing validity of *Culinary Workers Union Local 226 v. Del Papa*, 200 F.3d 614 (9th Cir. 1999). *Culinary Workers* involved a union's First Amendment challenge to a state statute. The statute had not been enforced and the attorney general's threat to prosecute was rendered meaningless by her apparent lack of authority to do so. *See id.* at 617-18. Nevertheless, we concluded that whether she actually had prosecutorial authority was irrelevant to the inquiry of whether the threat of prosecution was "imaginary or wholly speculative." *Id.* at 618. *See also Ripplinger v. Collins*, 868 F.2d 1043, 1047-48 (9th Cir. 1989) (holding that standing exists for a pre-enforcement challenge where plaintiffs conducted a business they believed violated the obscenity laws and only one of the fifteen plaintiffs had ever even been investigated).

F.3d 455, 467 (D.C. Cir. 1996) (requiring that a free exercise claim based on the hybrid rights exception must include an independently viable claim of infringement of a companion right); *Brown v. Hot, Sexy & Safer Prods.*, 68 F.3d 525, 539 (1st Cir. 1995) (same); *Kissinger v. Board of Trustees*, 5 F.3d 177, 180 (6th Cir. 1993) (declining to apply the hybrid rights exception entirely). Perhaps the Supreme Court will have an opportunity before the issue arises again in this circuit to refine its approach in this area in light of the experience of five circuits.

In any event, today the court tightens the requirements for ripeness and standing in this circuit, reining in those of our precedents which appeared to encourage every imaginably aggrieved individual to challenge potential enforcement of a law on constitutional grounds. No doubt the court is sincere in its application of these principles and would not use them as doctrines of convenience to avoid deciding a case whose merits appear unappetizing to address. Let us hope that today's shift in this circuit's standing jurisprudence is but the first step in restraining the exuberance with which we have embraced every opportunity to decide an asserted controversy. In that hope and in the court's opinion, I happily concur.

KLEINFELD, Circuit Judge, dissenting:

I respectfully dissent.

I agree with Judge O'Scannlain that under the law as it stood until today, plaintiffs had standing and their case was ripe.[1]

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[1] *Thomas v. Anchorage Civil Rights Commission*, 165 F.3d 692, 697-700 (9th Cir. 1999); *see Bland v. Fessler*, 88 F.3d 729, 737 (9th Cir. 1996); *Adult Video Ass'n v. Barr*, 960 F.2d 781, 786 (9th Cir. 1992), *vacated sub nom. Adult Video Ass'n v. Reno*, 509 U.S. 917 (1993), *reinstated in relevant part*, 41 F.3d 503 (9th Cir. 1994); *San Francisco County Democratic Central Comm. v. Eu*, 826 F.2d 814 (9th Cir. 1987), *aff'd*, 489 U.S. 214 (1989).

They still do, under controlling Supreme Court law on standing.

We cannot and should not shut the courthouse door to these litigants. The majority takes the position that there is no genuine controversy, because plaintiffs have no genuine and substantial risk that the law they challenge will be enforced against them. That proposition is unsupported by the record.

The majority's discussion about the history of enforcement does not support its conclusion. The history matters when a law is in desuetude, but no one claims that this fairly new law is like some nineteenth century ordinance never enforced in living memory. This case involves a fairly recent law that protects rental rights for unmarried couples. What is in desuetude is not the law, but the old expression "living in sin," that used to voice a social consensus condemning what the new law establishes as a right. The recent Alaska Supreme Court decisions in closely analogous cases establish, were there any doubt, that the law is actively enforced.[2]

The majority's reference to "some day" intentions, based on *Lujan v. Defenders of Wildlife*,[3] is irrelevant in this case. That doctrine rejects standing for plaintiffs who, for example, bring environmental lawsuits on the basis that, although they have never even been to the place affected by the proposed development, nevertheless "some day" might want to go there, and their pleasure would be impaired were the development to proceed. For this case to be analogous to the "some day" environmental cases, it would have to involve a person who is not a landlord but might some day want to buy an apartment building, and if he did, would not want to rent to unmarried couples. Such a person would lack standing. But

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[2]*Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274 (Alaska 1994); *Foreman v. Anchorage Equal Rights Comm'n*, 779 P.2d 1199 (Alaska 1989).

[3]*Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

the plaintiffs in our case already have apartments that they rent out, and they have discriminated against unmarried couples, do discriminate, and will discriminate, because of their religious beliefs about the tenants' sexual conduct. The landlords' violations of the challenged law are not a "some day" possibility, but a yesterday, today, and tomorrow reality.

The only factor that cuts against standing is that the plaintiffs have not gotten caught. That is not much of a factor in a First Amendment case. The law is that standing in a First Amendment case does not have to await enforcement of the law against that individual. All it takes, as the majority concedes, is "a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement" which is not "too imaginary" or "speculative" to support jurisdiction.[4] It does not take much of an imagination to come up with the idea that these landlords, who have publicly asserted their presently existing policy of discriminating against unmarried couples, will get caught by the agency that has the affirmative duty of seeking out and remedying violations of the law that prohibits that kind of discrimination.

Here are two of the Supreme Court decisions that require us to hold the courthouse door open for these plaintiffs. In both, no enforcement action had been taken against the plaintiffs. In *Doe v. Bolton*,[5] the Supreme Court held that physicians had standing to challenge an abortion law "despite the fact that the record does not disclose that any one of them has been prosecuted, or threatened with prosecution, for violation of the State's abortion statutes." The Court distinguished a case, as I have above, where "with a single exception, no one had ever been prosecuted" under a "moribund" century-old law.[6]

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[4]*Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979).

[5]*Doe v. Bolton*, 410 U.S. 179, 188 (1973).

[6]*Id.*

Likewise, in *Babbitt v. United Farm Workers National Union*,[7] the Court held that a union had standing to challenge a law's constitutionality where it alleged that it *might* inadvertently violate it, alleged "an intention to continue" in activities that might violate it, and the state had not "disavowed any intention" to prosecute, even though the penalty had *never* been applied to the kind of conduct at issue.

As for the majority's prudential concern about the need for a record to show just whom plaintiffs propose to discriminate against,[8] it is hard to take seriously the concern that we do not know whether plaintiffs mean to discriminate against such unmarried couples living together as a sister and brother, or a disabled individual with a resident caretaker of the opposite sex. Plaintiffs have been perfectly clear that they base their policy on a religious objection to what used to be called "living in sin," that is, a man and woman sharing quarters in circumstances where sexual relations could be reasonably expected without being married to each other.

The Christian landlords in this case have demonstrated a higher risk of enforcement than the physicians and the labor union in *Doe* and *United Farm Workers*. The defendants might be able to deprive plaintiffs of standing by disavowing any intention to prosecute, but they have not. The "disavow" language in *United Farm Workers* puts the burden on the governmental entity challenging standing to "disavow any intention" to enforce the law in the circumstances. Defendants have not disavowed any enforcement intentions; for all we know, they have a case ready to be filed as soon as our mandate issues.

The majority takes the position that to have standing in a First Amendment case, a person facing a realistic risk of

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[7] *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979).

[8] Slip Opinion at 9511 n.8.

enforcement of an unconstitutional statute has to have already violated it and been caught. Plaintiffs have already committed the violations, and propose to continue, but so far there has been no enforcement action against them. That is all that is missing from their standing case. But getting caught, or even violating the law in a way that creates a risk of getting caught, is not necessary for standing. "[W]hen fear of criminal prosecution under an allegedly unconstitutional statute is not imaginary or wholly speculative a plaintiff need not 'first expose himself to actual arrest or prosecution to be entitled to challenge [the] statute.' "[9]

If the majority's stretched standing doctrine arises out of concern about resolving a difficult and important issue, I share the concern. This is a hard case, because the contours of *Employment Division v. Smith*[10] are as yet undeveloped. Some would read the "hybrid" rights language in *Smith* so narrowly as to give it little practical applicability,[11] and treat any facially neutral law as constitutionally permissible, despite a religious obligation of some to violate it. Others, like the original panel in this case,[12] would read it more broadly. I doubt that *Smith* means that any facially neutral law stands, despite a religious obligation to violate it. Suppose, hypothetically, that a legislature passed a facially neutral law prohibiting circumcision, and that its reason was not anti-religious animus, but concern that the possible pain inflicted on the child exceeded the medical benefits from the procedure. Such a law would make it impossible for Jews and Moslems to practice one of their most sacred religious obligations. I suspect that under *Smith*, the no-circumcision law would be unconstitutional, by analogy to the no-parochial-schools law

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[9] *United Farm Workers Nat'l Union*, 442 U.S. at 302 (quoting *Steffel v. Thompson*, 415 U.S. 452, 459 (1974)).

[10] *Employment Division v. Smith*, 494 U.S. 872 (1990).

[11] *Kissinger v. Board of Trustees*, 5 F.3d 177, 180 (6th Cir. 1993).

[12] *Thomas v. Anchorage Civil Rights Commission*, 165 F.3d 692 (9th Cir. 1999).

in *Pierce v. Society of Sisters*,[13] because the no-circumcision law would abridge both the right to rear one's children in one's religion and the free exercise of one's religion.[14]

Now the more difficult case, where it is hard to identify a "hybrid" right. Suppose that a state or municipality prohibited without exception possession or consumption of alcohol, for the purpose of dealing with a widespread local problem of alcoholism and crimes committed by inebriated people. This law would effectively prohibit Catholics and some Protestants from celebrating communion. Would such a law be constitutional under *Smith*, because neutral, without anti-religious animus, and not "hybrid"? I am troubled by the notion that *Smith* definitively answers the question in the negative, though it may. The Free Exercise Clause is not mere surplusage. It establishes a constitutional right and has the force of law. Proper construction requires that the clause be construed to establish a right other than and in addition to the rights established by the Free Speech Clause, the Establishment Clause, and the Equal Protection Clause.

This case is somewhere in between my two hypothetical cases. Plaintiffs raise the question of whether the right to freely exercise one's religion and the rights to free speech and to control one's property are hybrid rights like the ones excepted from *Smith*'s neutrality rule. It is a serious question. They have standing to raise it. They are entitled to an answer. They genuinely and immediately need to know whether a constitutionally valid law prohibits them from acting as they are and have been in the exercise of their religious beliefs. I do not intimate what the answer should be, but am quite sure that we are not entitled under the law to slam the courthouse door on their suit requesting an answer.

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[13]*Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

[14]*See Smith*, 494 U.S. at 881.

APPENDIX B

VOLUME 1 of 2

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

KEVIN THOMAS and JOYCE BAKER,
Plaintiffs-Appellees,

v.

ANCHORAGE EQUAL RIGHTS COMMISSION and the MUNICIPALITY OF ANCHORAGE,
Defendants-Appellants,

and

PAULA HALEY in her official capacity as the Executive Director of the Alaska State Commission for Human Rights,
Defendant.

No. 97-35220
D.C. No.
CV-95-0274-HRH
and
CV-95-0275-HRH
OPINION

KEVIN THOMAS and JOYCE BAKER,
Plaintiffs-Appellees,

v.

ANCHORAGE EQUAL RIGHTS COMMISSION and the MUNICIPALITY OF ANCHORAGE,
Defendants,

and

PAULA HALEY in her official capacity as the Executive Director of the Alaska State Commission for Human Rights,
Defendant-Appellant.

No. 97-35221
D.C. No.
CV-95-0274-HRH
and
CV-95-0275-HRH

Appeals from the United States District Court
for the District of Alaska
H. Russel Holland, District Judge, presiding

Argued and Submitted
July 13, 1998—Anchorage, Alaska

Filed January 14, 1999

Before: Jerome Farris, Diarmuid F. O'Scannlain and Michael Daly Hawkins, Circuit Judges.

Opinion by Judge O'Scannlain;
Dissent by Judge Hawkins

SUMMARY

Government Law/Housing

The court of appeals affirmed a judgment of the district court. The court held that enforcement of state housing laws

prohibiting landlords from refusing to rent to unmarried couples infringes a Christian owner's rights under the Free Exercise Clause of the First Amendment.

Appellees Kevin Thomas and Joyce Baker own residential rental properties in Anchorage Alaska. They are Christians whose religious beliefs allegedly led them to refuse to rent to unmarried persons who plan to live together.

The State of Alaska and the City of Anchorage both have laws making it unlawful to refuse to rent real property to a person because of marital status. Under Alaska law, discrimination on the basis of marital status includes Thomas's and Baker's discrimination against unmarried couples.

The laws also make it illegal to make an inquiry or record of the marital status of a prospective renter, or to represent to a prospective tenant that property is unavailable on the basis of the lessee's marital status. The Anchorage ordinance also prohibits landlords from making, printing, or publishing any statement indicating any preference or discrimination based on marital status.

Thomas and Baker filed a federal declaratory/injunctive action against appellant Alaska and Anchorage officials, alleging that enforcement of the state and local antidiscrimination laws against them would violate their rights under the Free Exercise Clause of the First Amendment. They also asserted that the laws infringed their companion right to exclude persons from their property under the Takings Clause of the Fifth Amendment.

On cross-motions for summary judgment, the district court ruled that Thomas and Baker had standing, that their claims were ripe for review, and that application of the antidiscrimination laws against them would violate their rights under the Free Exercise Clause of the First Amendment. Additionally, the court concluded that because the laws

also impacted the landlords' free speech rights, they presented a "hybrid rights" case in which a "compelling interest" test applied. The court permanently enjoined both the State and the City from enforcing the laws against the landlords. The State and the City appealed.

[1] Under standing doctrine, because Thomas and Baker were not presently subject to prosecution, they had to demonstrate a reasonable threat of prosecution for conduct allegedly protected by the Constitution. [2] Thomas and Baker articulated concrete plans to violate the Alaska housing laws they challenged. The laws at issue had been enforced against similarly situated landlords. The state statute had been interpreted by the Alaska Supreme Court as mandating affirmative action on the part of the state human rights commission to root out all vestiges of housing discrimination. [3] Recent enforcement of the antidiscrimination laws demonstrated that they are not dead letter. [4] Thomas's and Baker's claims appeared to be justiciable.

[5] The "prudential" component of ripeness focuses on whether there is an adequate record on which to base effective review. Thomas and Baker admitted that they had turned away, and continue to turn away, prospective tenants based on their marital status. The relevant class of potential tenants was therefore *all* unmarried couples. [6] The facts essential to a decision by the court of appeals were undisputed. The parties' arguments centered on differing interpretations of the relevant legal standards. Such pure legal questions that require little factual development are more likely to be ripe than fact-intensive claims.

[7] The right to free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes or prescribes conduct that his religion prescribes or proscribes. A law failing to satisfy the requirements of neutrality and general applicability must be justified by a compelling govern-

mental interest, and must be narrowly tailored to advance that interest.

[8] There was no hint that the Alaska laws were drafted with care to forbid few instances of marital status discrimination but those occasioned by religious conviction. Nor did the laws in a selective manner impose burdens *only* on conduct motivated by religious belief. There was no indication that Alaska lawmakers were impelled by a desire to target or suppress religious exercise. The housing laws had the purpose of preventing discrimination on the basis of marital status; any burden on religiously motivated conduct was incidental.

[9] An individual claiming to be within the hybrid rights exception must make out a colorable claim that a companion right has been infringed. [10] The colorable claim standard is not altogether different from the traditional "likelihood of success on the merits" test that governs the issuance of preliminary injunctive relief. To trigger strict scrutiny, a hybrid-rights plaintiff must show a fair probability—a likelihood—of success on the merits of his companion claim.

[11] The Takings Clause does not "provide" the right to exclude; it merely protects that right from being taken without just compensation. The relevant inquiry was whether, by forbidding Thomas and Baker from refusing to lease or rent the real property to a person because of marital status, the state or municipality had "taken" that right.

[12] There was a "taking" in the literal sense. Insofar as they were compelled by the laws at issue to entertain the rental applications of unmarried cohabitants, Thomas and Baker were prevented from fully exercising their rights to exclude. However, not every destruction or injury to property is a "taking" in the constitutional sense. The question whether a law gives rise to an unconstitutional taking depends on the nature of the challenged government action.

[13] In judging whether a government regulation of property constitutes a "regulatory taking," a reviewing court must undertake an essentially ad hoc factual inquiry. Three factors are particularly important to the regulatory taking calculus: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action.

[14] Thomas and Baker did not allege that the laws at issue interfered with their investment-backed expectations, or otherwise adversely impact their economic interests. [15] However, the "bottom line" is not the sole measure of a successful Takings Clause claim. The Alaska laws at issue may not have reduced the value of Thomas's and Baker's property; however, the laws interfered with their "dominion" and "possession" of that property.

[16] Although the Alaska housing laws did not rise to the level of a permanent physical occupation sufficient to trigger a per se right to compensation, they authorized a "physical invasion" of the landlords' property just the same. Thomas and Baker made out a substantial argument that the Alaska laws went too far, and thus a colorable claim that their rights under the Takings Clause had been infringed. The Fifth Amendment served to "hybridize" their Free Exercise Clause challenge to the Alaska statute and the Anchorage ordinance.

[17] The speech restrictions at issue were not aimed solely at proscribing expression that does not more than propose a commercial transaction. They went much farther. [18] The expression contemplated by the Alaska laws was fully protected religious speech. The prohibited communications did not have to be presented as part of an advertising format. Nor did covered statements necessarily have to reference a specific product. Finally, although a landlord seeking to rent an apartment would possess an underlying economic motive, it was religious conviction that would have cause Thomas and

Baker to make the inquiries, records, representations, or communications contemplated by the Alaska laws.

[19] The expression forbidden by the Alaska antidiscrimination laws was at its essence religious speech, which enjoys plenary First Amendment protection. Moreover, both the statute and the ordinance purported to regulate landlords' speech based on its content. Content-based regulations of expression are presumed invalid under the First Amendment. [20] Thomas and Baker made a colorable claim that the Alaska housing laws infringed their rights to free speech. The First Amendment thus "hybridized" their Free Exercise challenge.

[21] Because Thomas and Baker demonstrated hybrid-rights claims under the Takings and Free Speech Clauses, it had to be determined whether government placed a substantial burden on the observation of a central religious belief or practice, and if so, whether a compelling governmental interest justified the burden.

[22] That a free exercise dispute arises from a commercial context does not in and of itself affect the substantiality of the claimed burden. [23] Because Thomas and Baker retained the cash-out option, the Alaska laws might not have made their free exercise significantly "more expensive." However, expense is not the sole consideration in determining whether a burden is constitutionally substantial. The Alaska housing laws de facto banished Thomas and Baker from the Alaska rental market and forced them to forsake their livelihoods as apartment owners and lessors. The laws did not effect a mere marginal reduction in business; they put Thomas and Baker out of business. [24] The laws substantially burdened Thomas's and Baker's religious rights.

[25] Even substantial burdens of religious exercise may be justified by a showing that a regulation's restrictions are necessary to the achievement of some compelling state interest.

Alaska's purported interest in preventing marital-status discrimination was not sufficiently paramount to satisfy strict scrutiny.

[26] That courts have not given unmarried couples any special consideration under the Equal Protection Clause is potent circumstantial evidence that society lacks a compelling governmental interest in the eradication of discrimination based on marital status. [27] The Supreme Court has expressly declined to extend a due process right to live with unrelated individuals such as unmarried cohabitants, and has approved regulations containing distinctions between married and unmarried couples, bestowing rights on the former it withholds from the latter. [28] The overwhelming majority of federal civil rights laws are silent on the issue of marital-status discrimination.

[29] Alaska law was likewise unavailing. That Alaska has granted its citizens a right to obtain housing accommodations without discrimination because of marital status was irrelevant. [30] Even if it were assumed that state law could alone suffice to create a compelling governmental interest in preventing discrimination against unmarried couples, Alaska's would not have met this test. For example the laws under review contain exceptions for "married-only" housing, and for space rented in the home of the landlord. Moreover, Alaska law expressly discriminates *against* unmarried couples in a number of contexts. Alaska's underenforcement of its purported interest in eradicating marital-status discrimination could not be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited. [31] There was no support for recognizing a compelling government interest in eradicating marital status discrimination that would excuse a violation of the Free Exercise Clause.

[32] Government action violates the Establishment Clause only if it does not have a secular legislative purpose, its prin-

cipal or primary effect is to advance or inhibit religion, or it fosters an excessive government entanglement with religion. Similarly, under the "endorsement" test, courts look to whether the challenged governmental practice either has the purpose or effect of endorsing religion.

[33] That the exemption might result in harm to third parties does not materially affect the Establishment Clause calculus. Establishment Clause jurisprudence concerns itself with only one kind of harm: the stigmatization of religious minorities. The only palpable injury suffered by an unmarried tenant turned away by a Christian landlord for religious reasons is a marginal reduction in the number of apartment units available for rent. The "harm" to the rejected lessee, if any, is economic, not religious; as such, it is beyond the pale of the Establishment Clause.

[34] By exempting Thomas and Baker from the scope of the Alaska anti-marital-discrimination laws, the court of appeals did not "establish" or otherwise endorse Christianity as an official state religion. The court's opinion reflected nothing more than the governmental obligation of neutrality in the face of religious differences. The Establishment Clause does not forbid what the Free Exercise Clause requires.

Judge Hawkins dissented, expressing the view that the case was unripe for judicial review; there was no support for the application of strict scrutiny; Thomas and Baker failed to present a colorable takings claim; and the majority erroneously characterized the expressions prohibited by the challenged laws as religious in nature.

COUNSEL

Cliff John Groh (argued), Assistant Municipal Attorney, Anchorage Equal Rights Commission, Anchorage, Alaska;

Robert A. Royce (argued), Assistant Attorney General, Department of Law, Anchorage, Alaska, for the defendants-appellants.

Kevin G. Clarkson (argued), Brena, Bell & Clarkson, Anchorage, Alaska, for the plaintiffs-appellees.

Caroline M. Brown, Covington & Burling, Washington, D.C.; John P. Relman, Washington Lawyer's Committee for Civil Rights & Urban Affairs, Washington, D.C., for the National Fair Housing Alliance amicus curiae.

Steven T. McFarland, Center for Law & Religious Freedom, Annandale, Virginia, for the Christian Legal Society, National Council of Churches, Union of Orthodox Jewish Congregations, Church of Jesus Christ of Latter-Day Saints, National Association of Evangelicals, and Ethics and Religious Liberty Commission amici curiae.

Steven K. Green, Washington, D.C., for the Americans United for Separation of Church and State amicus curiae.

Mark H. Wittow, Preston Gates & Ellis, Anchorage, Alaska, for the Alaska Civil Liberties Union amicus curiae.

Clyde J. Wadsworth, Heller Ehrman White & McAuliffe, San Francisco, California, for the Lambda Legal Defense and Education Fund amicus curiae.

Michael P. Seng, Chicago, Illinois, for the John Marshall Law School Fair Housing Legal Clinic amicus curiae.

Robert J. Barth, Oak Brook, Illinois, for the Institute in Basic Life Principles amicus curiae.

OPINION

O'SCANNLAIN, Circuit Judge:

We must decide whether the enforcement of Alaska housing laws prohibiting apartment owners from refusing to rent to unmarried couples infringes Christian landlords' rights under the Free Exercise Clause of the First Amendment.

I

Kevin Thomas and Joyce Baker are owners of residential rental properties in Anchorage, Alaska.[1] Thomas and Baker, as it turns out, are also professed Christians who believe that cohabitation between unmarried individuals constitutes the sin of fornication and that facilitating cohabitation in any way is tantamount to facilitating sin. That Thomas and Baker's beliefs regarding fornication are firmly rooted both in Biblical text[2] and in the commentaries of respected Christian theologians is not disputed by the parties.[3] Thomas and Baker have committed themselves to practicing their faith in all aspects of their lives, including their commercial activities as landlords. As a result, although they willingly rent to persons of any

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[1]Joyce Baker's husband, Gary Baker, has elected not to participate in this appeal or to defend the final judgment that the district court entered in his favor.

[2]*See, e.g., Genesis* 2:24 ("For this reason a man will leave his father and mother and be united to his wife, and they will become one flesh."); *1 Thessalonians* 4:3-4 ("It is God's will that you should be sanctified: that you should avoid sexual immorality; that each of you should learn to control his own body in a way that is holy and honorable, not in passionate lust like the heathen, who do not know God."); *Hebrews* 13:4 ("Marriage should be honored by all, and the marriage bed kept pure, for God will judge the adulterer and all the sexually immoral.").

[3]*See, e.g.*, John Calvin, *Calvin's Commentaries: The Epistles of Paul to the Romans and to the Thessalonians* 359 (David W. Torrance & Thomas F. Torrance, eds., Ross MacKenzie trans., 1960) ("There is nothing more opposed to holiness than the impurity of fornication, which corrupts the whole man.").

race, persons of either gender, single persons, and separated or widowed persons, they refuse to rent to unmarried persons who plan to live together.

Both the State of Alaska and the City of Anchorage have adopted laws aimed at preventing discrimination in rental housing. Among its provisions, the Alaska statute makes it unlawful "to refuse to sell, lease, or rent . . . real property to a person because of . . . marital status." Alaska Stat. § 18.80.240(1). The Anchorage ordinance is in all material respects identical. *See* Anchorage Mun. Code § 5.20.020(A) ("[I]t is unlawful . . . to . . . [r]efuse to sell, lease or rent . . . real property to a person because of . . . marital status."). Under Alaska law, discrimination on the basis of "marital status" includes discrimination against unmarried couples. *See Foreman v. Anchorage Equal Rights Comm'n*, 779 P.2d 1199, 1202 (Alaska 1989). There is no dispute that Thomas and Baker have previously declined to rent to unmarried cohabitants. Nor is there any question that they have vowed to continue to decline to rent to unmarried couples. Consequently, it is clear that Thomas and Baker's conduct fits squarely within the terms of the Alaska antidiscrimination laws. The only question before us is whether or not those laws may validly be enforced against Thomas and Baker as a matter of constitutional law.

Thomas and Baker filed suit in federal district court against Paula Haley (the Executive Director of the Alaska State Commission on Human Rights), the Anchorage Equal Rights Commission ("AERC"), and the Municipality of Anchorage, seeking prospective declaratory and injunctive relief pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 2201. The landlords claimed that any enforcement of the antidiscrimination laws against them would violate their constitutional rights under the Free Exercise Clause of the First Amendment.[4] On cross-

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[4]The Free Exercise Clause provides: "Congress shall make no law . . . prohibiting the free exercise [of religion]." U.S. Const. amend. I. The Free

motions for summary judgment, the district court concluded, as an initial matter, that Thomas and Baker had standing, that their claims were ripe for review, and that the Eleventh Amendment did not preclude the landlord's complaint against Haley. In a separate order, the court declared that the application of the antidiscrimination laws to Thomas and Baker would violate their rights under the Free Exercise Clause and therefore permanently enjoined both the State and the City from enforcing the laws against the landlords. This appeal ensued.

II

Initially, we must determine whether Thomas and Baker's claims are ripe for review. Neither Thomas nor Baker has yet been prosecuted; their suits are of the pre-enforcement variety. In the district court, the landlords sought a declaratory judgment and an injunction "prohibit[ing] the Appellants from acting to enforce Alaska and Anchorage anti-marital status discrimination laws against them or similarly situated landlords." The Declaratory Judgment Act, 28 U.S.C. § 2201, which authorizes anticipatory suits in some instances, does not relax or otherwise alter the requirement that a case be "ripe" for judicial review. *See Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240 (1937). In fact, § 2201 itself calls for "a case of actual controversy." Consequently, we must satisfy ourselves that "there is a substantial controversy . . . of suffi-

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Exercise Clause binds state governments by virtue of its incorporation into the Fourteenth Amendment. *See Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

Thomas and Baker also alleged that enforcement of the state and local laws would run afoul of the Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. §§ 2000bb-2000bb-4. The district court found in favor of the landlords on the basis of RFRA as well as the First Amendment. However, subsequent to the entry of the district court's order, the Supreme Court declared RFRA unconstitutional. *See City of Boerne v. Flores*, 117 S. Ct. 2157 (1997). Consequently, the arguments on appeal revolve exclusively around the Free Exercise Clause.

cient immediacy and reality to warrant the issuance of the declaratory judgment." *Lake Carriers' Ass'n v. MacMullen*, 406 U.S. 498, 506 (1972) (quoting *Maryland Cas. Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941)).

[1] The ripeness inquiry "focuses on whether there is sufficient injury [or threat of injury], and thus is closely tied to the standing requirement." *Portman v. County of Santa Clara*, 995 F.2d 898, 902-03 (9th Cir. 1993). Under standing doctrine, because Thomas and Baker are not presently subject to prosecution, they must demonstrate a "*reasonable threat* of prosecution for conduct allegedly protected by the Constitution." *Ohio Civil Rights Comm'n v. Dayton Christian Schs., Inc.*, 477 U.S. 619, 625 n.1 (1986) (emphasis added). The Supreme Court has alternately articulated this requirement for justiciability as consideration of whether the fear of prosecution or the alleged threats of prosecution are "not imaginary or wholly speculative." *See Babbit v. United Farm Workers Nat'l Union*, 442 U.S. 289, 302 (1979); *see also Steffel v. Thompson*, 415 U.S. 452, 459 (1974) (considering whether the alleged threats of prosecution "cannot be characterized as 'imaginary or speculative' "). The "reasonable threat" standards used in evaluating standing are equally applicable in determining ripeness. *See Adult Video Ass'n v. Barr*, 960 F.2d 781, 786 (9th Cir. 1992), *vacated sub nom.*, 509 U.S. 917 (1993), *reinstated in relevant part*, 41 F.3d 503 (9th Cir. 1994).

[2] We look to several factors in determining whether a "reasonable threat" of prosecution exists. For instance, this court has deemed it significant whether plaintiffs have articulated "concrete plans to violate" the acts they challenge. *See San Diego County Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1126-27 (9th Cir. 1996). Thomas and Baker clearly have done so. Both admitted that they have refused in the past, and will continue to refuse in the future, to rent to unmarried cohabitants in violation of the Alaska housing laws. Courts have also pointed to the existence of past prosecutions under the chal-

lenged laws as corroborative evidence of a "reasonable threat." *See id.* at 1128. Here, the laws at issue have been enforced in the recent past against similarly situated landlords. *See, e.g., Anchorage Equal Rights Comm'n v. Swanner,* 874 P.2d 274 (Alaska 1994); *Foreman,* 779 P.2d 1199. Indeed, the Alaska State Commission on Human Rights is *presently* engaged in an anti-marital-status discrimination enforcement proceeding against Alaska Pacific University. *See Alaska State Comm'n on Human Rights v. Alaska Pacific Univ.*, ASCHR No. C-96-010 (Complaint Served Feb. 3, 1997).[5] Moreover, as the district court observed in finding this case ripe for judicial review, the state statute has been interpreted by the Alaska Supreme Court as mandating affirmative action on the part of the state human rights commission to discover and root out all vestiges of housing discrimination. *See Hotel, Motel, Restaurant, Construction Camp Employees & Bartenders Union v. Thomas,* 551 P.2d 942, 945 (Alaska 1976) ("[T]he legislature intended the Commission to be more than a simple complaint-taking bureau; the statutory scheme constitutes a mandate to the agency to seek out and eradicate discrimination in . . . the sale, lease, or rental, of real property.").

[3] We have also analyzed the justiciability of claims like those of Thomas and Baker by considering whether the laws in question have fallen into desuetude or should be considered dead letter. In *San Francisco County Democratic Cent. Com. v. Eu,* we concluded that claims may be justiciable, notwithstanding a record of non-enforcement of the laws in question, if the record does not show that the laws in question are dead letter or have been "commonly and notoriously" violated. *See* 826 F.2d 814, 821-22 (9th Cir. 1987) (citing *Babbit v. United Farm Workers Nat'l Union,* 442 U.S. 289, 302-03 (1979)). Here, the recent enforcement of the anti-discrimination laws (as noted above) demonstrates that these laws are not dead let-

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[5]AERC having effectively conceded that the requirements for judicial notice are met, Thomas and Baker's Motion Requesting the Court to take Judicial Notice of the enforcement proceeding is GRANTED.

ter, nor is there any indication in the record that these laws are so "commonly and notoriously" violated as to render them dead letter, Thomas and Baker's violations notwithstanding. Moreover, if this court in *Eu* concluded that claims were justiciable where the law in question had *never* been enforced, *see* 826 F.2d at 821-22, we are hard pressed to see how Thomas and Baker's claims would not be justiciable where the laws in question have been and are presently being enforced.

Adult Video Ass'n is instructive on this point. There, we considered a challenge to provisions of the RICO statue allowing for pre-trial seizures. *See* 960 F.2d at 785. Nothing in the record indicated that the Department of Justice had ever conducted such seizures, but we concluded that the challenge was justiciable because the statute authorized such seizures, "no formal policy of the Department of Justice prohibit[ed] its prosecutors or officers from pursuing pre-trial seizures, and enforcement practices may change at any time in any case." *Id.* If this was sufficient to render the claim justiciable in *Adult Video Ass'n,* Thomas and Baker's claim must similarly be justiciable because they do not rely upon the mere possibility that "enforcement practices may change" — the antidiscrimination laws they challenge have been and are presently being enforced.

[4] The Supreme Court has held that when plaintiffs like Thomas and Baker wish to engage in conduct proscribed by statutes, they may challenge those statutes prior to enforcement where their fear of enforcement or the alleged threats of enforcement are "not imaginary or wholly speculative." *Babbit,* 442 U.S. at 302; *see also Adult Home Video Ass'n,* 960 F.2d at 785 (concluding that claim was justiciable because "apprehension" concerning enforcment was "reasonable"); *Darring v. Kincheloe,* 783 F.2d 874, 877 (9th Cir. 1986) ("[A]n 'imaginary or speculative' fear of prosecution is not enough."). In view of the facts (1) that Thomas and Baker continue to violate the antidiscrimination laws, (2) that the laws have been, and presently are being, enforced

against similarly situated landlords, (3) that Alaska and Anchorage authorities are aware of Thomas and Baker's persistent refusals to rent to unmarried couples, and (4) that the state human rights commission is under an ongoing and affirmative duty to seek out and to punish offending conduct, we cannot say that Thomas and Baker's fears of enforcement or alleged threats of enforcement are "imaginary or wholly speculative." Thus, their claims would appear to be justiciable.

This demonstration of a "reasonable threat" may end the ripeness inquiry. In *Adult Video Ass'n*, we held that "a conclusion that a reasonable threat of prosecution exists, for purposes of standing, effectively dispenses with any ripeness problem." 960 F.2d at 786. AERC insists, however, that a reviewing court must also determine that the issues before it are "fit for judicial decision." *San Diego County Gun Rights Comm.*, 98 F.3d at 1132. While we agree with *Adult Video Ass'n*'s conclusion that a reasonable threat of prosecution "effectively dispenses with any ripeness problem," 960 F.2d at 786, we also believe there can be little dispute that the issues here are fit for judicial resolution when considered under the prudential component of the ripeness inquiry. *See Portman*, 995 F.2d at 902 (recognizing that "[t]he ripeness inquiry contains both a constitutional and a prudential component").

[5] The "prudential" component of ripeness "focuses on whether there is an adequate record upon which to base effective review." *Portman*, 995 F.2d at 903. On that score, AERC maintains, "[t]he inadequacy of the factual record below makes this case unripe for judicial determination." Indeed, it contends that facts "critical" to the adjudication of the constitutional questions at issue are absent from the record. AERC complains, for instance, that there is no evidence in the record regarding the identity of potential tenants turned away by Thomas and Baker and that the record does not reveal Thomas and Baker's "actual" motivations for refusing to rent

to unmarried individuals. AERC's "prudential" ripeness argument misses the mark. The identity of potential tenants is simply not relevant to any issue bearing on the case. Thomas and Baker admitted that they have turned away, and continue to turn away, prospective tenants based upon their marital status. The relevant class of potential tenants, therefore, is *all* unmarried couples. Moreover, Thomas and Baker's religious motivations were uncontested in the district court. Nor were they seriously contested before us.

[6] We have found issues unripe for review when a decision "would be devoid of any factual context whatsoever," *San Diego Gun Rights Comm.*, 98 F.3d at 1132, or would "rest[ ] upon [a] hypothetical situation[ ]," *Portman*, 995 F.2d at 903. The record in this case suffers from no such grave defect. There are no "insuperable obstacles," *Rescue Army v. Municipal Court*, 331 U.S. 549, 574 (1947), to our reaching a decision on the merits of the underlying constitutional claims. Quite the contrary, as shall become clear in parts below, we have before us all the facts we need to issue an informed decision, among them (1) that Thomas and Baker sincerely believe that cohabitation is a sin, (2) that on that basis, they have refused, and continue to refuse, to rent to unmarried couples, in violation of Alaska law, and (3) that the options available to the landlords are surrendering their beliefs, violating the law, and giving up their livelihoods in residential real estate. These facts — the facts essential to our decision — are, as the district court found, "undisputed." The parties' arguments center not upon differing interpretations of the record, but instead upon the differing interpretations of the relevant legal standards. Such "pure legal questions that require little factual development are more likely to be ripe" than fact-intensive claims. *San Diego Gun Rights Comm.*, 98 F.3d at 1132.

This simply is not a "sketchy record . . . with many unknown facts." *American-Arab Anti-Discrimination Comm. v. Thornburgh*, 970 F.2d 501, 510 (9th Cir. 1991). It is, we

conclude, "an adequate record upon which to base effective review." *Portman*, 995 F.2d at 903. We therefore agree with the district court's decision insofar as it held the landlords' claims ripe for judicial review, and now turn to an examination of those claims.

III

[7] In *Employment Division v. Smith*, 494 U.S. 872 (1990), the Supreme Court reviewed the constitutionality of an Oregon law that criminalized the ingestion of peyote, as applied to two individuals who claimed that they used the drug as part of a religious ceremony of the Native American Church. In upholding the law against a Free Exercise Clause challenge, the Court held that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).' " *Id.* at 879 (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in the judgment)). The Court's holding in *Smith* has become the backbone of recent Free Exercise Clause jurisprudence, as most burdens on religious liberty are not direct and intentional, but rather the largely unintended incident of neutral, generally applicable regulations.[6] The Court has made clear,

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[6]Unlike the majority of other courts to address the issue, *see, e.g., Ryan v. United States Dep't of Justice*, 950 F.2d 458 (7th Cir. 1991); *Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464 (8th Cir. 1991), this court originally construed *Smith* as applying only to neutral, generally applicable *criminal* laws. *See American Friends Serv. Comm. v. Thornburgh*, 961 F.2d 1405, 1407 (9th Cir. 1991). Judge Fernandez expressed his disagreement with what he called this court's "crabbed view" of *Smith* and insisted that *Smith*'s holding should be understood as applying to all neutral, generally applicable laws, whether civil or criminal. *See Goehring v. Brophy*, 94 F.3d 1294, 1306 (9th Cir. 1996) (Fernandez, J., concurring). Judge Fernandez's view appears to have prevailed in practice. Last Term, in *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997), the Supreme Court concluded that Congress had exceeded its authority

however, that "[a] law failing to satisfy [the *Smith*] requirements [of neutrality and general applicability] must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 531 (1993).

Citing *Lukumi*, Thomas and Baker contend that the statute and ordinance at issue in this case fail to satisfy *Smith*'s requirement that laws be of "general applicability" and are thus subject to strict First Amendment scrutiny. The *Lukumi* decision involved a series of Hialeah, Florida, ordinances that the Court found "target[ed]" certain religious practices — specifically, ritual animal sacrifice — of the Santeria religion. *See id.* at 542. The Court concluded that the ordinances were neither neutral nor generally applicable. *See id.* at 532-546. The Court therefore subjected the ordinances to "the most rig-

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under § 5 of the Fourteenth Amendment when it passed the Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. § 2000bb-2000bb-4. *Boerne* involved a local zoning ordinance — a *civil* regulation — that the Fifth Circuit had found invalid under RFRA. The Supreme Court held that RFRA was, in essence, an impermissible attempt to override legislatively its decision in *Smith*. Obviously, in order to invalidate RFRA on the basis that it did, the Court had to conclude that RFRA was in conflict with *Smith*. And in order for such a conflict to exist (at least in the context of the case before it), the Court had to conclude that *Smith*, like RFRA, applied to civil statutes and ordinances as well as criminal.

The civil-criminal distinction is not particularly relevant to the analysis of the Alaska statute's constitutionality because that statute makes violation of its terms a misdemeanor, punishable by fine or imprisonment. *See* Alaska Stat. § 18.80.270. The precise nature of the Anchorage ordinance is less certain. Section 5.30.070 does make it a misdemeanor to "willfully resist[ ], prevent[ ], impede[ ] or interfere[ ] with the equal rights commission or any of its authorized representatives," but it is not clear that the ordinance renders the very act of refusing to rent on the basis of marital status criminal. Thus, to the extent that the Anchorage ordinance is a purely civil statute, the Supreme Court's implicit determination in *Boerne* that *Smith* reaches civil, as well as criminal, laws is significant, and controls our analysis.

orous of scrutiny" and ultimately voided them as in violation of the Free Exercise Clause. *Id.* at 546.

With respect to the requirement of general applicability, the *Lukumi* Court started from the proposition that government "cannot in a selective manner impose burdens *only* on conduct motivated by religious belief." *Id.* at 543 (emphasis added). Observing that the ordinances contained numerous exemptions (that seemingly permitted all animal killings except those of the Santeria), the Court rejected the City's claim that the ordinances there at issue advanced the twin interests of protecting public health and preventing animal cruelty: "The ordinances are underinclusive for those ends. They fail to prohibit nonreligious conduct that endangers these interests in a similar or greater degree than Santeria sacrifice does." *Id.* In other words, considering the numerous exemptions, it was clear that "each of Hialeah's ordinances pursue[d] the city's governmental interests only against conduct motivated by religious belief." *Id.* at 545. The Court thus concluded that "the ordinances [we]re drafted with care to forbid few killings but those occasioned by religious sacrifice." *Id.* at 543.

Thomas and Baker claim that, like the ordinances at issue in *Lukumi,* the Alaska laws are "underinclusive and, therefore, not generally applicable." Specifically, they point to the fact that the Alaska statute prohibits "refus[ing] to sell, lease, or rent the real property to a person because of . . . marital status" but expressly allows "the sale, lease or rental of classes of real property commonly known as housing for 'singles' or 'married couples' only." Alaska Stat. § 18.80.240. Likewise, they note that the Anchorage ordinance excepts from its scope landlords who rent space in "individual home[s] wherein the renter or lessee would share common living areas with the owner, lessor, manager, agent or other person." Anchorage Mun. Code § 5.20.020. Because, Thomas and Baker argue, "[b]y way of these laws marital status dis-

crimination is specifically allowed under certain circumstances," the laws are constitutionally suspect.

The underinclusiveness at play in *Lukumi*, however, was of a different constitutional order altogether from that at issue here. There, "the underinclusion [was] substantial, not inconsequential." *Lukumi*, 508 U.S. at 543. There, the ordinances were "drafted with care to forbid few killings but those occasioned by religious sacrifice." *Id.* Here, in contrast to the situation in *Lukumi*, the "underinclusion" — which consists of only a single exception per challenged provision — is relatively inconsequential. Boiled down, in *Lukumi*, the ordinances applied essentially *only* to the Santeria; here, the challenged laws apply essentially to *all* landlords.

Underinclusiveness is not in and of itself a talisman of constitutional infirmity; rather, it is significant only insofar as it indicates something more sinister. In *Lukumi*, the Court considered the ordinances' lack of neutrality and general applicability as a proxy of the Hialeah lawmakers' illicit intention to single out the Santeria religion for unfavorable treatment. The Court observed that the pattern of exemptions present in the Hialeah ordinances betrayed their object as one of suppressing religious exercise. *See id.* at 533-46. Because the ordinances were "designed to persecute or oppress a religion or its practices," *id.* at 547, the Court concluded that the permissive *Smith* standard did not apply.

[8] There is no hint that the Alaska laws were "drafted with care to forbid few [instances of marital status discrimination] but those occasioned by religious [conviction]." *Id.* at 543. Nor do the laws "in a selective manner impose burdens *only* on conduct motivated by religious belief." *Id.* at 543 (emphasis added). There is, in sum, no indication that Alaska lawmakers were impelled by a desire to target or suppress religious exercise. The housing laws, we think, have the purpose of preventing discrimination on the basis of marital status; any burden on religiously motivated conduct, even if

substantial, is incidental. Consequently, absent some other exception, *Smith*, not *Lukumi*, governs the landlords' claims.

IV

Thomas and Baker insist that the laws here at issue *do* fall within the scope of a second exception to *Smith*: the so-called "hybrid-rights" exception. In so arguing, they point to the following language from the Court's opinion in *Smith*:

> The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press, *see Cantwell v. Connecticut*, 310 U.S., at 304-307 (invalidating a licensing system for religious and charitable solicitations under which the administrator had discretion to deny a license to any cause he deemed nonreligious); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) (invalidating a flat tax on solicitation as applied to the dissemination of religious ideas); *Follett v. McCormick*, 321 U.S. 573 (1944) (same), or the rights of parents, acknowledged in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), to direct the education of their children, *see Wisconsin v. Yoder*, 406 U.S. 205 (1972) (invalidating compulsory school-attendance laws as applied to Amish parents who refused on religious grounds to send their children to school).

Smith, 494 U.S. at 881 (parallel citations omitted). The Court in *Smith* found that the facts of that case did not present "such a *hybrid* situation, but a free exercise claim unconnected with any communicative activity or parental right." *Id.* at 882 (emphasis added).

Thomas and Baker contend that the Alaska housing laws implicate not only their rights to free exercise, but other constitutional rights as well. Consequently, they argue that their claims are within the hybrid-rights exception to *Smith* and require strict scrutiny. They first claim that the laws' prohibitions against "refus[ing] to sell, lease[,] or rent" to unmarried cohabitants, Alaska Stat. § 18.80.240(1); Anchorage Mun. Code § 5.20.020(A), infringe their rights, grounded in the Fifth Amendment, to exclude others from their property. Thomas and Baker also maintain that certain portions of the housing laws burden their First Amendment free speech rights. Specifically, they point to the provisions of the laws that make it unlawful for a landlord to "make a written or oral inquiry or record" of the marital status of a prospective lessee, Alaska Stat. § 18.80.240(3); Anchorage Mun. Code § 5.20.020(C), or to "represent to a person that real property is not available for inspection, sale, rental, or lease" on the basis of the lessee's marital status, Alaska Stat. § 18.80.240(5); Anchorage Mun. Code § 5.20.020(E). The Anchorage ordinance also prohibits landlords to "make, print or publish" any communication or statement indicating any preference or discrimination based upon marital status. Anchorage Mun. Code § 5.20.020(G).

A

Before determining whether the landlords' hybrid-rights argument succeeds on the merits, we must decide whether a hybrid-rights exception to *Smith* actually exists and, if so, exactly what a hybrid-rights claim entails. Addressing the issue, the district court concluded:

> These prohibitions . . . impact plaintiffs' freedom of speech and bring this case within the purview of those hybrid cases acknowledged by the Supreme Court in *Smith*. Plaintiffs assert a colorable claim under the First Amendment and the compelling interest test should be applied.

In a footnote, the court clarified its understanding of the hybrid-rights exception's scope:

> Plaintiffs do not contend that they could "carry the day" with these First Amendment arguments, nor does the *Smith* decision imply any such requirement. Plaintiffs simply assert that their free speech rights are implicated in this case along with their free exercise rights, and therefore the compelling interest test should be used. The court agrees.

Thomas and Baker substantially agree with the district court's characterization of the hybrid-rights exception as turning upon the demonstration of a "colorable claim." They contend that it is sufficient to trigger strict scrutiny that their free speech and property rights were "burdened." Appellant Haley, by contrast, maintains that the "companion" right (the non-free-exercise half of the hybrid) must itself be constitutionally "protected," that is, it must be independently viable.

The Supreme Court has been somewhat less than precise with regard to the nature of hybrid rights. In *Smith*, the Court referred to claims involving the Free Exercise Clause "in conjunction with" or "[ ]connected with" other constitutional protections. *Smith*, 494 U.S. at 881. Last Term, in *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997), the Court paraphrased the *Smith* hybrid passage and spoke of cases that "implicated" other constitutional rights alongside free exercise freedoms. *See id.* at 2161. Perhaps not surprisingly in view of the Supreme Court's rather cryptic explanations, the courts of appeals have struggled to decipher *Smith*'s hybrid-rights formula and have reached divergent conclusions as to exactly what constitutes a hybrid-rights claim. The First and District of Columbia Circuits have suggested that *Smith* mandates the existence of an independently viable companion right in addition to free exercise. *See EEOC v. Catholic University of America*, 83 F.3d 455, 467 (D.C. Cir. 1996) (holding that an independent Establishment Clause violation triggered the

hybrid exception); *Brown v. Hot, Sexy & Safer Prods.*, 68 F.3d 525, 539 (1st Cir. 1995) (concluding that the hybrid exception was not triggered because the plaintiffs had not shown an independent substantive due process violation). The Tenth Circuit, on the other hand, requires only a "colorable claim of infringement," that is, something less than an outright violation of a companion right yet more than a simple allegation. *See Swanson v. Guthrie Indep. Sch. Dist. No. I-L*, 135 F.3d 694, 700 (10th Cir. 1998).

We have never explored in any detail the contours of the so-called hybrid-rights doctrine.[7] In undertaking that task today, we must at the outset confess that none of the contending interpretations of *Smith*'s hybrid-rights passage is perfect. Each, unfortunately, entails certain logical and interpretive difficulties.[8] Indeed, faced with what it viewed as the

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[7]When we have discussed hybrid rights under *Smith*, we have sent mixed signals. *See American Friends Serv. Comm. Corp. v. Thornburgh*, 961 F.2d 1405, 1407 (9th Cir. 1992). In *American Friends*, we initially characterized a hybrid claim as one "which *contains* not only a free exercise challenge to government action, but also another substantive constitutional claim as well." *Id.* at 1408 (emphasis added). Our suggestion that a hybrid-rights claim need only "contain[ ]" a non-free-exercise "challenge" would seem to imply that another right need only be pleaded alongside a free exercise claim. Other portions of the *American Friends* opinion, however, suggest an assumption that perhaps the existence of an independently viable companion right is a necessary prerequisite to a hybrid claim. For instance, in so concluding, the *American Friends* court observed that the challenge before it was not "based on any *cognizable constitutional claim* in addition to its free exercise claim; its claim is therefore not 'hybrid.' " *Id.* at 1409 (emphasis added).

[8]Proponents and critics of the *Smith* decision alike have questioned the Court's attempted distinction of the so-called hybrid cases and the hybrid-rights doctrine to which the distinction gave rise. *See* William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. Chi. L. Rev. 308, 309 (1991) ("Its use of precedent borders on fiction."); Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. Chi. L. Rev. 1109, 1122 (1990) ("[A] legal realist would tell us . . . the *Smith* Court's notion of 'hybrid' claims was not intended to be taken

"complete[ ] illogic[ ]" of the hybrid-rights exception, the Sixth Circuit opted to ignore it altogether and to proceed as if *Smith* applied categorically to *all* neutral, generally applicable laws incidentally burdening free exercise rights. *See Kissinger v. Board of Trustees*, 5 F.3d 177, 180 (6th Cir. 1993) ("[A]t least until the Supreme Court holds that legal standards under the Free Exercise Clause vary depending upon whether other constitutional rights are implicated, we will not use a stricter test than that used in *Smith* to evaluate generally applicable, exceptionless state regulations under the Free Exercise Clause."). Although undoubtedly the path of least resistance, there is a salient problem with the Sixth Circuit's decision simply to throw up its hands in despair: *Smith* did not overrule *Cantwell*, *Murdock*, *Follett*, and *Yoder*; it distinguished them. Those cases — each of which requires an exemption from a neutral, generally applicable law (and thus contradicts the central holding of *Smith*) — remain on the books and are binding on lower courts. We are not at liberty to ignore them.

We therefore turn, as we believe we must, to consider the nature of "hybrid" rights.

B

We begin our analysis, perhaps paradoxically, with Justice Souter's separate concurrence in *Lukumi*, in which he roundly criticized *Smith*'s notion of hybrid-rights:

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seriously."). One commentator speculated regarding *Smith*'s hybrid-rights analysis thusly: "Justice Scalia had only five votes. He apparently believed he couldn't overrule anything, and so he didn't. He distinguished everything away instead." Douglas Laycock, *Free Exercise and the Religious Freedom Restoration Act*, 62 Fordham L. Rev. 883, 902 (1994). As an intermediate court of appeals charged with resolving a specific controversy, we lack the luxury that the ivory tower provides. Our job is not to critique or to deconstruct; ours is to make sense of a confusing doctrinal situation — to make the pieces fit.

> [T]he distinction *Smith* draws strikes me as ultimately untenable. If a hybrid claim is simply one in which another constitutional right is implicated, then the hybrid exception would probably be so vast as to swallow the *Smith* rule, and, indeed, the hybrid exception would cover the situation exemplified by *Smith*, since free speech and associational rights are certainly implicated in the peyote ritual. But if a hybrid claim is one in which a litigant would actually obtain an exemption from a formally neutral, generally applicable law under another constitutional provision, then there would have been no reason for the Court in what *Smith* calls hybrid cases to have mentioned the Free Exercise Clause at all.

Lukumi, 508 U.S. at 567 (Souter, J., concurring). In other words, according to Justice Souter, the application of the hybrid-rights exception can turn neither upon the fact that a companion right is "implicated" (else the central holding of *Smith* vanishes) nor upon the existence of a fully protected, independently viable companion right (else the Free Exercise Clause itself vanishes).

Justice Souter was clearly correct, we think, to reject an independently-viable-rights theory of hybrid rights. We acknowledge that, in siding with Justice Souter, we part company with two of our sister circuits. *See Catholic University of America*, 83 F.3d at 467; *Hot, Sexy & Safer*, 68 F.3d at 539. Nonetheless, the Supreme Court's repeated references to the Free Exercise Clause in the so-called hybrid cases leave us with little doubt that, whatever else it did, the Court did *not* rest its decisions in those cases upon the recognition of independently viable free speech and substantive due process rights. *See Yoder*, 406 U.S. at 214, 215, 218, 219-220 (alluding to the Free Exercise Clause); *Follett*, 321 U.S. at 576, 577 (same); *Murdock*, 319 U.S. at 107, 108, 111, 114, 115 (same); *Cantwell*, 310 U.S. at 300, 303, 305, 307 (same). We will not lightly presume that, in specifically and continually invoking

the Free Exercise Clause, the Supreme Court was wasting its breath. Just as we do when faced with a declaration of the legislative department, *see, e.g., Park N' Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985) ("Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose."), we must take a judicial pronouncement at face value. We will not speculate or hypothesize about the Justices' "true" intentions; rather, we will assume that those intentions are expressed in the words the Justices carefully chose to express *the opinion of the Court*. When the Court said "Free Exercise Clause," it meant it.

We also agree with Justice Souter's observation that the mere fact that a companion right is "implicated" cannot serve as the touchstone for heightened scrutiny. Government action will almost always "implicate" a host of constitutional rights, even though it does not seriously threaten, much less violate, any of them. Hence, under a permissive "implication" standard, rarely if ever would a neutral, generally applicable law be subject to the general rule of *Smith* (including, as Justice Souter pointed out, the Oregon law at issue in *Smith* itself). The same conclusion follows *a fortiori* if all that is needed to trigger strict scrutiny is the mere *allegation* of a companion right.

[9] Although we accept Justice Souter's premises, we cannot subscribe to his ultimate conclusion — that the hybrid-rights doctrine is "untenable." Instead, we believe that the best understanding of *Smith* actually suggests an approach to hybrid-rights claims that falls somewhere between the two extremes marked out by Justice Souter. That is to say, an individual claiming to be within the hybrid-rights exception may not rest upon a bald assertion that a companion right exists or the fact that a companion right is somehow "implicated" by a government policy. Nor, however, is he required to show that the law he challenges is invalid under a companion provi-

sion alone, without regard to the Free Exercise Clause. Like our colleagues on the Tenth Circuit, and like the district court here, we conclude that a plaintiff invoking *Smith*'s hybrid exception must make out a "colorable claim" that a companion right has been infringed. *See Swanson*, 135 F.3d at 700.

[10] To be sure, a "colorable claim" standard does not provide the exactitude of an allegation-only standard or an independently-viable-rights standard; it will require courts reviewing free exercise claims to make difficult, qualitative, case-by-case judgments regarding the strength of companion-claim arguments. The term "colorable" certainly is not meaningless, however. *Webster's* provides what we think is a useful explanation, defining colorable to mean "seemingly valid and genuine." *Webster's Third New International Dictionary* 449 (1986). Nor is the word "colorable" a term without legal pedigree. For instance, in habeas cases not governed by the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, Supreme Court precedent dictates that courts need only entertain successive petitions in which the prisoner supplements his constitutional claim with a "colorable showing of factual innocence." *Kuhlmann v. Wilson*, 477 U.S. 436, 454 (1986). In *Kuhlmann*, the Supreme Court explained its colorable-showing standard as requiring that the petitioner demonstrate a "fair probability" that "the trier of facts would have entertained a reasonable doubt of his guilt." *Id.* at 454 n.17 (quoting Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 160 (1970)) (internal quotation marks omitted). Similarly, only recently, the Supreme Court observed that a defendant seeking to obtain discovery on a selective prosecution claim must establish a "colorable basis" for the claim, and acknowledged a consensus among courts of appeals that the colorable-basis standard "require[s] some evidence tending to show the existence of the essential elements of the defense." *United States v. Armstrong*, 517 U.S. 456, 468 (1996); *accord United States v. Bourgeois*, 964 F.2d 935, 938-39 (9th Cir. 1992). Courts engage in similarly complex,

fact-sensitive inquiries in other contexts, albeit without specifically employing the term "colorable." *See, e.g.*, Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d)(1)(A) (stating that the determination whether to award fees to a prevailing party in a civil case brought by or against the United States depends upon whether the government's position, although incorrect, was "substantially justified"); *Pierce v. Underwood*, 487 U.S. 552, 565 (1988) (interpreting EAJA's "substantially justified" language to mean having a "reasonable basis in both law and fact"). Indeed, the colorable-claim standard we adopt today for evaluating hybrid-rights claims is not altogether different from the traditional "likelihood of success on the merits" test that governs the issuance of preliminary injunctive relief. *See Coalition for Economic Equity v. Wilson*, 110 F.3d 1431, 1438 (9th Cir. 1997) ("A preliminary injunction may issue 'if the movant has shown either a likelihood of success on the merits and the possibility of irreparable injury, or that serious questions are raised and the balance of hardships tips sharply in the movant's favor.' " (quoting *Armstrong v. Mazurek*, 94 F.3d 566, 567 (9th Cir. 1996))). Consequently, although not perfectly precise, the colorable-claim test is not standardless. Rather, despite subtle variations, there is, we think, a certain "center of gravity" to these formulations that informs our understanding of what it means to state a "colorable" claim: In order to trigger strict scrutiny, a hybrid-rights plaintiff must show a "fair probability" — a "likelihood" — of success on the merits of his companion claim.

Furthermore, particularly in view of the interpretive difficulties surrounding *Smith*'s hybrid-rights passage, we believe that any hybrid rule's administrability must play second fiddle to its consistency with Supreme Court precedent. And on that score, a colorable-claim standard is clearly superior to the alternatives. It avoids the pitfalls of both the more permissive "implication" and "allegation-only" tests and the more exacting "independently-viable-rights" test identified by Justice Souter. Under an implication standard, the claims raised in

Smith would themselves have been within the scope of the hybrid-rights exception (not the general rule), since free speech rights "are certainly implicated in the peyote ritual," *Lukumi*, 508 U.S. at 567 (Souter, J., concurring) (emphasis added). An implication standard thus renders the result in *Smith* — that no hybrid claim was demonstrated and that strict scrutiny was therefore inapplicable — a non sequitur. The colorable-claim standard we adopt engenders no such problem. The plaintiffs in *Smith* could not have made out a "colorable claim of infringement" with respect to their free speech rights. Ingesting peyote is certainly not "speech" in the traditional sense; at best, it is "expressive conduct." And the only cases in which the Supreme Court has invalidated laws regulating expressive conduct are those in which it has concluded that the government has prohibited such conduct "*precisely because of its communicative attributes*." *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 576 (1991) (Scalia, J., concurring in the judgment) (citing *United States v. Eichman*, 496 U.S. 310 (1990), *Texas v. Johnson*, 491 U.S. 397 (1989), *Spence v. Washington*, 418 U.S. 405 (1974), *Tinker v. Des Moines Indep. Comm. Sch. Dist.*, 393 U.S. 503 (1969), *Brown v. Louisiana*, 383 U.S. 131 (1966), and *Stromberg v. California*, 283 U.S. 359 (1931)). There was no serious argument in *Smith* that the Oregon legislature had targeted the respondents' use of peyote because of the message it conveyed. Hence, given a colorable-claim standard of hybrid rights, *Smith* was decided exactly as it should have been. On the other hand, whereas an independently-viable-rights interpretation of hybrid rights cannot reasonably explain the Supreme Court's repeated allusions to the Free Exercise Clause in *Cantwell*, *Murdock*, *Follett*, and *Yoder*, a colorable-claim standard jibes perfectly with the Court's side-by-side references to the Free Exercise Clause and free speech and substantive due process rights in those cases. Consequently, among the potential approaches to hybrid rights, only a colorable-claim standard accounts *both* for *Smith* (which an

implication standard cannot) *and* for the original hybrid cases (which an independently-viable-rights standard cannot).

Because, under the rule we announce today, a free exercise plaintiff must make out a "colorable claim" that a companion right has been violated — that is, a "fair probability" or a "likelihood," but not a certitude, of success on the merits — neither the central holding of *Smith* nor the Free Exercise Clause is rendered without substantive bite. Our colorable-claim standard is therefore neither too lax nor too strict, but "just right."

C

We now turn to consider whether Thomas and Baker have demonstrated a "colorable claim of infringement" with respect to their so-called companion rights. Recall that they complain that the laws infringe their Fifth Amendment "right to exclude" and their First Amendment right to free speech. Because the landlords' principal complaint is that the Alaska laws purport to require them actually to rent to unmarried cohabitants, we consider the Fifth Amendment claim first.

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[11] Thomas and Baker contend that the Takings Clause of the Fifth Amendment,[9] "provides a property owner constitutional protection to exclude others from the owners (sic) property." It is true that the Supreme Court has "repeatedly held that . . . the right to exclude [others is] 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.' " *Nollan v. California Coastal*

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[9]The Takings Clause provides: "[N]or shall private property be taken for public use, without just compensation." U.S. Const. amend. V. The Takings Clause applies to the States through the Fourteenth Amendment. *See Chicago, Baltimore & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 239 (1897).

Comm'n, 483 U.S. 825, 831 (1987) (quoting *Loretto v. Teleprompter v. Manhattan CATV Corp.,* 458 U.S. 419, 433 (1982) (quoting *Kaiser Aetna v. United States,* 444 U.S. 164, 176 (1979))); *accord* 2 William Blackstone, *Commentaries on the Laws of England* *8 ("[O]ccupancy gave the right to . . . exclude[ ] every one else but the owner from the use of it."). Technically speaking, however, the Takings Clause does not "provide" the right to exclude; it merely protects against that right being "taken . . . without just compensation." The relevant inquiry, therefore, is not whether Thomas and Baker possess a right to exclude others from their rental properties. They do. The question is whether, by forbidding them from "refus[ing] to sell, lease[,] or rent the real property to a person because of . . . marital status," the State (or the municipality, as the case may be) has "taken" that right.

[12] There has, of course, been a "taking" in the literal sense. Insofar as they are compelled by the laws at issue to entertain the rental applications of unmarried cohabitants, Thomas and Baker are prevented from fully exercising their rights to exclude. *See Pruneyard Shopping Center v. Robins,* 447 U.S. 74, 82 (1980). However, "not every destruction or injury to property by governmental action has been held to be a 'taking' in the constitutional sense." *Armstrong v. United States,* 364 U.S. 40, 48 (1960). The question whether a law gives rise to an unconstitutional taking depends upon the nature of the challenged government action. As the Supreme Court explained in *Yee v. City of Escondido,* 503 U.S. 519 (1992), Takings Clause cases generally fall into one of two categories:

> Where the government authorizes a physical occupation of property (or actually takes title), the Takings Clause generally requires compensation. *See, e.g., Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419, 426 (1982). But where the government merely regulates the use of property, compensation is required only if considerations such as the purpose

> of the regulation or the extent to which it deprives the owner of the economic use of the property suggest that the regulation has unfairly singled out the property owner to bear a burden that should be borne by the public as a whole. *See, e.g., Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 123-125 (1978). The first category of cases requires courts to apply a clear rule; the second necessarily entails complex factual assessments of the purposes and economic effects of government actions.

Id. at 522-23 (parallel citations omitted).

In *Yee*, a group of mobile home owners challenged the constitutionality of a local rent control ordinance. Viewed in conjunction with California's Mobilehome Residency Law, Cal. Civ. Code Ann. § 798, they argued, the ordinance unconstitutionally required the owners to submit to a permanent physical occupation of their property under the *Loretto* line of cases. The Supreme Court, however, rejected their claim. Significantly, the Court expressly rejected the notion, urged by the landowners, that they possessed a *per se* Takings Clause right to "choose their incoming tenants." *Id.* at 530-31. Rather, the Court acknowledged, "[w]hen a landowner decides to rent his land to tenants, the government may . . . require the landowner to accept tenants he does not like . . . without *automatically* having to pay compensation." *Id.* at 529 (citing *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261 (1964)) (emphasis added).

The *Yee* Court's holding, however, was narrow. The Court simply concluded that because the mobile home owners had "voluntarily open[ed] their property to occupation by others, [they could not] assert a *per se* right to compensation based on their inability to exclude particular individuals." *Id.* at 531. The Court expressly acknowledged that a landlord's inability to choose his tenants "may be relevant to a *regulatory* taking argument, as it may be one factor a reviewing court would

wish to consider in determining whether the ordinance unjustly imposes a burden on [a] petitioner[ ] that should 'be compensated by the government, rather than remain[ing] disproportionately concentrated on a few persons.' " *Id.* at 531 (quoting *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978)) (emphasis added).[10]

[13] In judging whether a government regulation of property constitutes a "regulatory taking," a reviewing court must undertake an "essentially ad hoc, factual inquir[y]." *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979). The Supreme Court has, however, recognized three factors as particularly important to the regulatory-taking calculus: (1) the economic impact of the regulation on the claimant, (2) the extent to which the regulation has interfered with distinct investment-backed expectations, and (3) the character of the governmental action. *See Eastern Enterprises v. Apfel*, 118 S. Ct. 2131, 2135 (1998); *Penn Central*, 438 U.S. at 124.

[14] Thomas and Baker have not alleged that the laws at issue interfere with their investment-backed expectations or otherwise adversely impact their economic interests. Nor could they, it would seem, at least absent a showing that, by renting to unmarried couples in accordance with the challenged laws, their net number of "units rented" would go *down*. Common sense would appear to dictate the opposite conclusion: A rule requiring a landlord to rent to a certain class of otherwise disqualified people would enlarge the pool of prospective renters, and thus perhaps increase — but certainly not decrease — his bottom line by reducing the likelihood that any given apartment would remain vacant.

[15] The Supreme Court has consistently acknowledged, however, that the "bottom line" is not the sole measure of a

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[10]The Court in *Yee* did not squarely address the regulatory-takings issue because it was not "fairly included in the question on which [the Court] granted certiorari." *Yee*, 503 U.S. at 533.

successful Takings Clause claim. In *Loretto,* for instance, the Court concluded that a property right had been "taken" notwithstanding the fact that the claimed infringement — a requirement that apartment owners permit the installation of cable television boxes and wires on their buildings — in all likelihood *increased* the value of the owners' property. *See Loretto,* 458 U.S. at 437 n.15. Indeed, just last Term, the Court reaffirmed its "longstanding" commitment to the proposition that "property is more than economic value; it also consists of 'the group of rights which the so-called owner exercises in his dominion of the physical thing,' such 'as the right to possess, use and dispose of it." *Phillips v. Washington Legal Found.,* 118 S. Ct. 1925, 1933 (1998) (quoting *United States v. General Motors Corp.,* 323 U.S. 373, 380 (1945)) (internal citations omitted). The Alaska laws may not reduce the monetary value of Thomas and Baker's property; however, there can be no doubt that the laws interfere with the landlords' "dominion" and "posess[ion]" of that property.

[16] Under the "character-of-the-regulation" prong of the regulatory takings analysis, "[a] 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the social good." *Penn Central,* 438 U.S. at 124. Although the Alaska housing laws do not, under *Yee,* rise to the level of a *permanent physical occupation* sufficient to trigger a per se right to compensation, they authorize a "physical invasion" of the landlords' property just the same. We thus conclude that Thomas and Baker have made out a substantial argument that the Alaska laws "go[ ] too far," *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 415 (1922), and, thus, a colorable claim that their rights under the Takings Clause of the Fifth Amendment have been infringed. Hence, the Fifth Amendment serves to "hybridize" their Free Exercise Clause challenge to § 18.80.240(1) of the Alaska statute and § 5.20.020(A) of the Anchorage ordinance.

2

With respect to Thomas and Baker's free speech challenge,[11] Haley contends that the expression at issue in this case is "constitutionally unprotected" commercial speech. Although so-called commercial speech is not outside the scope of the First Amendment, the Supreme Court has made clear that "[t]he Constitution . . . affords a lesser protection to commercial speech than to other constitutionally guaranteed expression." *United States v. Edge Broadcasting Co.*, 509 U.S. 418, 426 (1993). Consequently, "[b]ecause the degree of protection afforded by the First Amendment depends upon whether the activity sought to be regulated constitutes commercial or non-commercial speech, we must first determine the proper classification of the [expression] at issue here." *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66 (1983).

a

There is no litmus test for distinguishing commercial from noncommercial expression. Indeed, the Supreme Court itself has acknowledged that the "precise bounds" of commercial speech are "subject to doubt." *Zauderer v. Supreme Court of Ohio*, 471 U.S. 626, 637 (1985). Until relatively recently, the Court seemed to treat commercial speech as if it entailed both a "core" and a "periphery." Inside the core was expression that did "no more than propose a commercial transaction." *Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976); *see also Bolger*, 463 U.S. at 66 (dubbing speech that "does no more than propose a commercial transaction" the "core notion" of commercial speech). Core commercial speech included "advertising pure and simple," *Zauderer*, 471 U.S. at 637, as well as other

[11]The Free Speech Clause provides: "Congress shall make no law . . . abridging the freedom of speech . . . ." The Free Speech Clause applies to the States through the Fourteenth Amendment. *See Gitlow v. New York*, 268 U.S. 652, 666 (1925).

expression reducible to the formula, "I will sell you the X at the Y price," *Virginia Pharmacy*, 425 U.S. at 762. Speech outside the core, the Court held, "present[ed] a closer [First Amendment] question." Reviewing courts therefore had to "examine[ ] carefully" restrictions that transcended the core of commercial speech "to ensure that speech deserving of greater constitutional protection [was] not inadvertently suppressed." *Bolger*, 463 U.S. at 66. As a guide, the Supreme Court in *Bolger* set out three indicia of non-core commercial speech: (1) an advertising format; (2) a reference to a specific product; and (3) an underlying economic motive of the speaker. *See Bolger*, 463 U.S. at 67.

In recent years, the Court appears quite self-consciously to have pared down the definition of commercial speech. In *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993), the Court renounced as too broad its earlier characterization of commercial speech in *Central Hudson Gas and Electric Corp. v. Public Service Commission*, 447 U.S. 557, 561 (1980), as any "expression related solely to the economic interests of the speaker and its audience." *See Discovery Network*, 507 U.S. at 422 ("We did not . . . use that definition in either *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983), or in *Board of Trustees of State University of N.Y. v. Fox*, 492 U.S. 469 (1989)." (parallel citations omitted)). The Court in *Discovery Network* also cast serious doubt upon *Bolger*'s bifurcated core-periphery framework. *See id.* at 423. The Court strongly suggested that the *only* type of expression that is "commercial" in the constitutional sense is that which does "no more than propose a commercial transaction." Citing its decision in *Fox*, the Court held that "the proposal of a commercial transaction [is] '*the test* for identifying commercial speech.' " *Id.* (quoting *Fox*, 492 U.S. at 473-74) (emphasis in *Discovery Network*).

[17] It seems clear enough that the speech restrictions at issue in this case are not aimed solely at proscribing expression that does "no more than propose a commercial

transaction." Rather, they go much farther, and make it unlawful for a landlord (1) to "make a written or oral inquiry or record" of the marital status of a prospective lessee, (2) to "represent to a person that real property is not available for inspection, sale, rental, or lease" on the basis of the lessee's marital status, or (3) to "make, print or publish" any communication or statement indicating any preference or discrimination based upon marital status. Alaska Stat. § 18.80.240; Anchorage Mun. Code § 5.20.020. This simply is not a case of "I will sell you X at the Y price." *Virginia Pharmacy*, 425 U.S. at 762. Under *Discovery Network*, that observation alone suffices to classify the expression as non-commercial.

[18] Even were we to assume that *Bolger*'s bifurcated analysis survived *Discovery Network* and thus remained a viable approach to defining commercial speech, we would nonetheless be compelled to conclude that the expression contemplated by the Alaska laws is not mere commercial speech, but fully protected religious speech. *None* of the three factors outlined in *Bolger* is applicable here. The communications prohibited by the Alaska laws need not be presented as part of an "advertising format" to fall within the laws' scope. Nor would covered statements necessarily have to reference a "specific product." Finally — and, we think, most importantly — although a landlord seeking to rent an apartment would, almost by definition, possess an underlying "economic motive," it is religious conviction, not economics, that would cause Thomas or Baker (or any other similarly situated landlord) to make the inquiries, records, representations, or communications contemplated by the Alaska laws. Indeed, far from emanating from any pecuniary motive, a landlord's statement, "I prefer not to rent to unmarried couples," runs directly *counter* to his economic interests. A Christian landlord in Thomas and Baker's position has a distinct economic *disincentive* to speak up about his opposition to non-marital cohabitation. By expressing his beliefs, he runs the risk of losing a prospective tenant and leaving a vacant apartment unrented. When he speaks up anyway, he does so, not for eco-

nomic reasons, but out of religious conviction. We recognize, of course, that the *Bolger* Court did not envision its decision as establishing a hard-and-fast formula for identifying non-core commercial speech; none of the factors is either necessary or sufficient to a determination that any given speech is "commercial." *See Bolger*, 463 U.S. at 67 & n.14. However, just as the Court in *Bolger* deemed the simultaneous *presence* of all three factors to be persuasive evidence that the speech there at issue was commercial in character, *see id.* at 67, we believe that the simultaneous *absence* of all three is indicative of the non-commercial nature of the expression prohibited by the Alaska housing laws.

Consequently, whether under the narrow construction of commercial speech adopted in *Virginia Pharmacy* and recently endorsed in *Discovery Network* or the more permissive framework outlined in *Bolger*, we conclude that the expression targeted by the Alaska housing laws cannot be considered mere commercial speech. The simple fact is that not all speech which takes place in the context of a commercial transaction is "commercial speech."[12]

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[12]Even were we to assume that the Alaska laws did primarily target commercial speech, we would not review them under the deferential *Central Hudson* test normally applied to commercial-speech restrictions. *See Central Hudson*, 447 U.S. at 566 (subjecting commercial speech restrictions to a form of intermediate scrutiny). The laws' plain language "does not limit the scope of regulated activity to purely commercial speech." *S.O.C., Inc. v. County of Clark*, 152 F.3d 1136, 1143 (9th Cir. 1998). Rather, fully protected religious speech is also burdened. Hence, the laws are "overbroad" and, as such, subject to strict First Amendment scrutiny. *See id.* at 1142-44 (invalidating a law as overbroad because it neither limited its scope to "speech which does no more than propose a commercial transaction" nor provided an exception for speech that contained both commercial and expressive elements); *see also Riley v. National Fed'n of the Blind*, 487 U.S. 781, 796 (1988) ("[E]ven assuming, without deciding, that such speech in the abstract is indeed merely 'commercial,' we do not believe that the speech retains its commercial character when it is inextricably intertwined with otherwise fully protected speech.").

b

[19] Here, the expression forbidden by the Alaska anti-discrimination laws is, at its essence, religious speech, which enjoys plenary First Amendment protection. *See, e.g., Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393-94 (1993). Moreover, there can be no doubt that both the Alaska statute and the Anchorage ordinance purport to regulate landlords' speech based upon its content. Under the laws, apartment owners and lessors are permitted to make inquiries, representations, and statements regarding some subjects, such as a prospective lessee's annual income, but not others, such as the lessee's marital status. "It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys." *Rosenberger v. Rectors & Visitors of the University of Virginia*, 515 U.S. 819 (1995) (citing *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 96 (1972). Indeed, content-based regulations of expression are presumed invalid under the First Amendment. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

[20] Based upon the presumption of unconstitutionality that attaches to content-discriminatory laws of the sort at issue in this case, we believe that Thomas and Baker have made a colorable claim that the Alaska housing laws infringe their rights to free speech. The First Amendment thus serves to "hybridize" their Free Exercise challenge to §§ 18.80.240(3) and 18.80.240(5) of the Alaska statute and §§ 5.20.020(C), 5.20.020(E), and 5.20.020(G) of the Anchorage ordinance.

V

[21] Because we conclude that Thomas and Baker have successfully demonstrated hybrid-rights claims under the Takings and Free Speech Clauses, we must determine "whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden."

Hernandez v. Commissioner, 490 U.S. 680, 699 (1989). We address the issues in turn. If the former question begets an affirmative response and the latter a negative, we must invalidate the Alaska laws insofar as they apply to Thomas and Baker and similarly situated landlords.

A

[22] With regard to the burden issue, Thomas and Baker argue that the laws present them with a Hobson's Choice of sorts between (1) violating their religious beliefs by renting to unmarried couples, (2) suffering punishment for refusing to rent to unmarrieds, and (3) forsaking their livelihoods as apartment owners altogether. That choice, they argue, renders the burden on their religious beliefs "substantial." Director Haley counters on two fronts. As an initial matter, she points out that "[t]he landlords' religion does not require them to rent housing"; rather, they do so "as a matter of choice for personal profit." She insists that "[t]he fact that the landlords' religious objection arises from regulation of their voluntary commercial activity renders any burden insubstantial." In support of her proposed prophylactic "commercial activity" exception to the substantial-burden rule, Haley relies upon *United States v. Lee*, 455 U.S. 252 (1982), and *Tony and Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290 (1985). Most prominently, Haley points to the *Lee* Court's statement that

> [w]hen followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in the activity.

Lee, 455 U.S. at 261. Contrary to Haley's suggestion, however, the *Lee* Court never intimated that the fact that a free exercise dispute arises in a "commercial" context might *in*

and of itself affect the substantiality of the claimed burden. On the contrary, it expressly concluded that the government regulation there at issue — compulsory participation in the social security system — *did* "interfere[ ] with [the petitioners'] free exercise rights." *Id.* at 257. Seemingly assuming that the burden was substantial, the Court then proceeded immediately to consider whether or not the government could save the law by demonstrating a compelling state interest in the maintenance of the challenged program. *See id.* at 257-58. Concluding that it could, the Court rejected Lee's free exercise claim. *See id.* at 260. The mere fact that the Court in *Lee* reached the compelling-interest issue (which is logically subsequent to the burden issue) confirms that it found a substantial burden.

Haley's reliance upon *Alamo* is similarly misplaced. She cites *Alamo* for the proposition that regulations which "apply only to commercial activities undertaken with a 'business purpose' " do not constitute constitutionally substantial burdens on free exercise. *Alamo*, 471 U.S. at 305. The language that Haley recites, however, is taken, not from the portion of the opinion addressing the substantial-burden issue, but rather from a passage disposing of *Establishment Clause* challenges. Consequently, neither *Lee* nor *Alamo* supports a per se (or even presumptive) rule that burdens levied in commercial contexts are not constitutionally substantial. *See Attorney General v. Desilets*, 636 N.E.2d 233, 238 (Mass. 1994) ("The fact that the defendants' free exercise of religion claim arises in a commercial context, although relevant when engaging in a balancing of interests, does not mean that their constitutional rights are not substantially burdened.").

Haley's second argument regarding the burden issue goes something like this: Thomas and Baker may avoid having either to compromise their religious beliefs or to face criminal penalties by simply "cashing out," that is, by selling their apartments and redeploying their capital in another investment; because the landlords retain that option, any burden on

their religious rights is constitutionally insubstantial. To determine whether or not the Alaska laws at issue substantially burden Thomas and Baker's freedom of religion, we must "look[ ] to the degree that the government's requirement will, directly or indirectly, make the believer's religious duties more difficult or more costly." Laurence H. Tribe, *American Constitutional Law* § 14-12, at 1247 (2d ed. 1988). This court has stated that, at a minimum, the interference with religious beliefs "must be more than an inconvenience." *Graham v. Commissioner*, 822 F.2d 844, 851 (9th Cir. 1987), *aff'd sub nom., Hernandez v. Commissioner*, 490 U.S. 680 (1989). In attempting to show that the burden on Thomas and Baker's religious exercise is nothing more than a simple inconvenience, Haley relies heavily upon *Braunfield v. Brown*, 366 U.S. 599 (1961). There, the Supreme Court rejected challenges to a Pennsylvania Sunday-closing law brought by Orthodox Jewish merchants. The storeowners claimed that, if they wished to exercise their religious beliefs by remaining closed to business on the Saturday sabbath, enforcement of the law would put them at a distinct economic disadvantage vis a vis their non-Sabbatarian competitors. The Court, however, refused their argument, stating that a governmental regulation that merely "operates so as to make the practice of [an individual's] religious beliefs more expensive" does not impose a sufficiently "substantial burden" to trigger Free Exercise Clause scrutiny. *Id.* at 605.[13]

[23] It is true that, because Thomas and Baker retain the cash-out option, the Alaska laws might not make their free exercise significantly "more expensive."[14] Expense, however, is not the sole consideration involved in determining whether

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[13]The Supreme Court has, however, recognized that some purely financial burdens might be so severe as to rise to the level of constitutionally "substantial." *See Jimmy Swaggart Ministries v. Board of Equalization*, 493 U.S. 378, 392 (1990).

[14]That is not to say that there might not be distinct sunk costs involved in cashing out.

a burden is constitutionally substantial or is instead merely "inconvenien[t]." *See id.* The burden imposed upon Thomas and Baker is qualitatively different — though we think no less severe — than an imposition of increased cost: The Alaska housing laws de facto banish both Thomas and Baker from the Alaska rental market altogether and force them to forsake their livelihoods as apartment owners and lessors. The laws do not effect a mere marginal reduction in business; they put Thomas and Baker out of business.

Moreover, Haley's "could have just quit" argument would seem equally applicable to the *successful* free exercise plaintiffs in the so-called "unemployment compensation cases," none of whom alleged that his respective religion required that he work for an employer whose business practices contravened his sincerely held religious beliefs. *See Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136 (1987); *Thomas v. Review Board*, 450 U.S. 707 (1981); *Sherbert v. Verner*, 374 U.S. 398 (1963). In none of those cases did the Court entertain — much less credit — the argument that the religious adherent could simply have left his job and have found an occupation that better suited his religious beliefs and practices. Rather, the Court's cases centered on a simple principle:

> Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden on religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.

Hobbie, 480 U.S. at 141 (quoting *Thomas*, 450 U.S at 717-18). The same "substantial pressure" to modify behavior and to violate beliefs that was present in the unemployment

compensation cases is at work here. The same Hobson's Choice that faced the employee-plaintiffs in those cases confronts Thomas and Baker.

Director Haley insists that the unemployment compensation cases are "inapplicable, because engaging in the rental business is not a government benefit," as is receiving welfare. Although we acknowledge a distinction between being deprived of unemployment "benefits" and being deprived of one's chosen occupation, it is hard to imagine why the distinction is one with a constitutional difference. Surely, one's statutory entitlement to government largesse holds no talismanic significance over and above one's interest in exercising his professional skills in his own way, such that the denial of the former triggers First Amendment scrutiny but the denial of the latter does not. *Cf. Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) ("[Fourteenth Amendment 'liberty'] denotes . . . the right of the individual . . . to engage in any of the common occupations in life."). In neither case, it would seem, is the pressure to conform decisively more "unmistakable." *See Sherbert*, 374 U.S. at 404.

[24] We thus conclude that the Alaska laws (and the trilemma of sorts they present) do "substantially burden" Thomas and Baker's religious rights.

B

[25] Of course, "[n]ot all burdens on religion are unconstitutional." *Bowen v. Roy*, 476 U.S. 693, 701 (1986). Even substantial burdens on religious exercise may be justified by a showing that a regulation's restrictions are necessary to the achievement of some compelling state interest. Whether a compelling governmental interest justifies Alaska's anti-marital-status discrimination laws is the question to which we now turn.

The Supreme Court has provided some insight into the nature of the interests that are sufficiently "compelling" to

survive strict Free Exercise Clause scrutiny. In *Sherbert*, for instance, the Court declared that, in order to restrict religious exercise, the State must advance "paramount interests." *Sherbert*, 374 U.S. at 406 (quoting *Thomas v. Collins*, 323 U.S. 516, 530 (1945). Likewise, in *Yoder*, the Court stated that it would defer only to "interests of the highest order." *Yoder*, 406 U.S. at 215. Most recently, the Court in *Lukumi* reaffirmed that "[t]he compelling interest standard that we apply once a law fails to meet the *Smith* requirements is not 'water[ed] . . . down' but 'really means what it says.'" *Lukumi*, 508 U.S. 520, 546 (quoting *Smith*, 494 U.S. at 888). Director Haley contends that the laws pass constitutional muster even under strict scrutiny because "Alaska has compelling interests in eradicating discrimination in housing on the basis of marital status." We disagree. Alaska's purported interest in preventing marital-status discrimination is simply not sufficiently "paramount" to satisfy strict scrutiny. *See generally Swanner v. Anchorage Equal Rights Comm'n*, 513 U.S. 979 (1994) (Thomas, J., dissenting from denial of certiorari).

Only twice has the Supreme Court recognized the prevention of discrimination as an interest compelling enough to justify restrictions on constitutional rights. In 1983, in *Bob Jones University v. United States*, 461 U.S. 574 (1983), the Court concluded that there is an "overriding interest" in eradicating racial discrimination. *Id.* at 604. A year later, in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), the Court acknowledged a compelling government interest in preventing discrimination based upon gender. *See id.* at 623. Although the *Roberts* Court was less than clear with respect to the precise considerations that led it to conclude that the elimination of gender discrimination constituted a compelling government interest, the Court in *Bob Jones* was more explicit: It based its decision upon what it deemed a "firm national policy" against race discrimination. *Bob Jones*, 461 U.S. at 593. For support, the Court adverted to examples of anti-race-discrimination measures taken from all three branches of the federal government: In the judiciary, *Brown v. Board of Education*, 347 U.S.

483 (1954), and *Cooper v. Aaron*, 358 U.S. 1 (1958); in Congress, the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 1971, 1975a-1975d, 2000a-2000h6), the Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73 (codified as amended in scattered sections 18 U.S.C., 25 U.S.C., 28 U.S.C., and 42 U.S.C.), and the Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973gg-10); and in the executive branch, orders issued by Presidents Truman, Eisenhower, and Kennedy prohibiting racial discrimination in various sectors. Of course, had it opted to do so, the *Bob Jones* Court might easily have further elaborated, and cited as support for its "firm national policy" the Civil War and the Thirteenth, Fourteenth, and Fifteenth Amendments that followed on its heels. The post-Reconstruction history of this country leaves little room for argument as to the existence of a national commitment to the elimination of race discrimination.

[26] It is beyond cavil that there is no similar "firm national policy" against marital-status discrimination. The Supreme Court has never accorded marital status any heightened scrutiny under the Equal Protection Clause, as it has both race, *see, e.g., Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), and gender, *see, e.g., United States v. Virginia*, 518 U.S. 515 (1996). Nor has any court of appeals, for that matter. *See Smith v. Shalala*, 5 F.3d 235, 239 (7th Cir. 1993) ("Because [a] classification based on marital status does not involve a suspect class and does not impact a fundamental interest, we must examine it under the rational basis test."); *cf. United States v. Omoruyi*, 7 F.3d 880, 881 (9th Cir. 1993) ("Peremptory challenges based on marital status do not violate [*Batson v. Kentucky*, 476 U.S. 79 1986)]."). And although equal protection analysis may not be determinative of the compelling interest inquiry, it assuredly is not, as Director Haley claims, "irrelevant." The Equal Protection Clause is concerned more specifically than any other constitutional provision with the issue of discrimination; it is therefore emi-

nently sensible to look to equal protection precedent as a proxy for the importance that attaches to the eradication of particular forms of discrimination. The fact that courts have not given unmarried couples any special consideration under the Equal Protection Clause is potent circumstantial evidence that society lacks a compelling governmental interest in the eradication of discrimination based upon marital status.

[27] The Supreme Court's decision in *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), is also not insignificant in determining whether a "firm national policy" against marital-status discrimination exists. There, the Court considered a substantive due process challenge to a local housing ordinance that limited dwelling occupancy to single families. The ordinance defined "family" in such a manner as to exclude from its scope a woman living with her son and two grandsons. *See id.* at 496 & n.2. The City argued to the Court that its earlier decision in *Belle Terre v. Boraas*, 416 U.S. 1 (1974), required it to uphold the ordinance. In *Belle Terre*, the Court had upheld against constitutional challenge another city's single-family-dwelling ordinance. The *Moore* Court, however, easily distinguished its earlier holding:

> [O]ne overriding factor sets this case apart from *Belle Terre*. The ordinance there affected only unrelated individuals. It expressly allowed all who were related by "blood, adoption, or marriage" to live together, and in sustaining the ordinance we were careful to note that it promoted "family needs" and "family values."

Id. at 498. The Supreme Court has, therefore, for all intents and purposes, recognized a substantive due process right to live with relatives (such as spouses), but has expressly declined to extend such a right to "unrelated" individuals (such as unmarried cohabitants). Hence, far from articulating any constitutional policy against marital-status discrimination, the Supreme Court has itself approved regulations containing

distinctions between married and unmarried couples, bestowing upon the former rights it withholds from the latter.[15]

[28] Nor do congressional enactments evince any discernible legislative policy against marital-status discrimination. Significantly, the federal statute most analogous to the Alaska laws here at issue, the Fair Housing Act, 42 U.S.C. § 3601-3631, makes no mention whatsoever of "marital status" among its catalogue of six protected categories. *See, e.g., id.* § 3604(a) ("[I]t shall be unlawful . . . [t]o refuse to sell or rent . . . a dwelling to any person because of race, color, religion, sex, familial status, or national origin."[16]). Indeed, the overwhelming majority of federal civil rights laws are silent on the issue of marital-status discrimination. *See, e.g.*, 42 U.S.C. § 2000a(a) (prohibiting discrimination in places of public accommodation "on the ground of race, color, religion, or national origin"); 42 U.S.C. § 2000d (prohibiting discrimination in any federally funded program "on the ground of race, color, or national origin"); 42 U.S.C. § 2000e-2(a) (prohibiting discrimination in employment "because of [an] individual's race, color, religion, sex, or national origin"). Similarly, whereas the Sentencing Guidelines authorize penalty enhancements for defendants who select their victims based upon "race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation," they make no mention of marital status. U.S.S.G. § 3A1.1(a). To be sure, there are a handful of federal statutes that do forbid marital-status discrimination. *See* 5 U.S.C. § 2301(b)(2); 15 U.S.C. § 1691(a); 20 U.S.C. § 1071(a)(2). A "handful," however, do not a "firm national policy" make.

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[15]Of course, the Supreme Court has not maintained distinctions between married and unmarried persons in all contexts. *See, e.g., Eisenstadt v. Baird*, 405 U.S. 438 (1972) (holding unconstitutional a law that permitted married couples but prohibited unmarried couples from purchasing contraceptives). However, in the housing context — the most relevant context for our purposes — the Supreme Court has drawn and enforced such lines.

[16]"Familial status" is defined under the Act as relating to the domicile of children with adults.

[29] Alaska law is likewise unavailing. As an initial matter, we think it strange to reference Alaska law (in isolation) as evidence of a compelling government interest in eradicating marital status discrimination. *Alaska* law certainly cannot alone suffice to demonstrate a "firm *national* policy." Nor, would it seem, can a single *state*'s law evince — under any standard — a compelling government interest for *federal* constitutional purposes. The fact that Alaska has granted its citizens a "civil right" to "obtain . . . housing accommodations . . . without discrimination because of . . . marital status," *see* Alaska Stat. § 18.80.210, is irrelevant. Surely there are other states that are less enthusiastic. Under Director Haley's reasoning, presumably Alaska would possess a compelling interest in eradicating marital-status discrimination but, say, Alabama, would not. Under such a state-specific approach to identifying compelling interests, all fields of federal constitutional law in which courts employ strict scrutiny — including free speech, free exercise, equal protection, and substantive due process — would be balkanized beyond the point of recognition. States could unilaterally "opt out" of federal constitutional rules (the Free Exercise Clause among them) simply by adopting particular legislative policies. Coherent constitutional doctrines would no longer exist; rather, we would be subjected to fifty individual sub-constitutions, each according the government a slightly different degree of authority to infringe constitutional rights.

[30] Even were we to assume that state law could alone suffice to create a compelling governmental interest in preventing discrimination against unmarried couples, Alaska's would not meet this constitutional test. For example, the very laws under review contain exceptions for "married-only" housing, *see* Alaska Stat. § 18.80.240, and for space rented in the home of the landlord, *see* Anchorage Mun. Code § 5.20.020. Moreover, as Justice Moore observed in his dissent in *Swanner,* Alaska law expressly discriminates *against* unmarried couples in a number of contexts:

> [T]he government itself discriminates based on marital status in numerous regards, and there is no suggestion that this practice should be reexamined. Alaska law explicitly sanctions such discrimination. *See, e.g.*, AS 13.11.015 (intestate succession does not benefit unmarried partner of decedent); AS 23.30.215(a) (workers' compensation death benefits only for surviving spouse, child, parent, grandchild, or sibling); Alaska R. Evid. 505 (no marital communication privilege between unmarried couples); *Serradell v. Hartford Accident & Indemn. Co.*, 843 P.2d, 639, 641 (Alaska 1992) (no insurance coverage for unmarried partner under family accident insurance policy).

Swanner, 874 P.2d at 288-89. Alaska's "underenforcement" of its purported interest in eradicating marital-status discrimination is critical, because "[i]t is established in . . . strict scrutiny jurisprudence that 'a law cannot be regarded as protecting an interest "of the highest order" . . . when it leaves appreciable damage to that supposedly vital interest unprohibited.' " *Lukumi*, 508 U.S. at 547 (quoting *Florida Star v. B.J.F.*, 491 U.S. 524, 541-42 (1989) (Scalia, J. concurring in part and concurring in judgment)).

[31] There is simply no support from any quarter for recognizing a compelling government interest in eradicating marital-status discrimination that would excuse what would otherwise be a violation of the Free Exercise Clause. Not all discrimination is created equal.

VI

Having satisfied ourselves that Thomas and Baker have successfully demonstrated hybrid-rights claims within the meaning of *Smith*, that the Alaska housing laws substantially burden free exercise rights, and that the laws are not justified by any compelling government interest, we must lastly deter-

mine whether there is any independent bar to granting the landlords an exemption from the laws under the Free Exercise Clause. AERC insists that there is such a bar: The Establishment Clause.[17] Specifically, AERC argues that exemptions granted under the Free Exercise Clause violate the Establishment Clause "where the conduct sought to be protected by the Free Exercise Clause would result in direct injury to other identifiable persons."

[32] Obviously, Free Exercise Clause exemptions do not *as a general matter* violate the Establishment Clause. *See Hobbie*, 480 U.S. at 144-45 ("This Court has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause."). If they did, then *Yoder*, *Sherbert*, *Hobbie*, *Thomas*, and *Lukumi* (to name just a few cases in which the Court granted exemptions under the Free Exercise Clause) would have been decided differently. Although recent Establishment Clause doctrine undoubtedly suffers from a sort of jurisprudential schizophrenia, we are not altogether without guidance in evaluating Establishment Clause challenges. Pursuant to the oft-criticized-but-still-extant three-prong standard of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), government action violates the Establishment Clause only if (1) it does not have a "secular legislative purpose," or (2) its "principal or primary effect" is to advance or inhibit religion, or (3) it fosters an "excessive government entanglement" with religion. *Id.* at 612-13. Similarly, under the so-called "endorsement" test, courts look to "whether the challenged governmental practice either has the purpose or effect of

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[17]The Establishment Clause provides: "Congress shall make no law respecting an establishment of religion . . . ." U.S. Const. amend. I. Although the Establishment Clause was originally understood as a guarantee *to* state governments that Congress would leave church-state relations to the individual States, the Supreme Court has long subscribed to the view that the Establishment Clause applies *against* the States through the Fourteenth Amendment. *See Everson v. Board of Educ.*, 330 U.S. 1, 8 (1947).

'endorsing' religion." *County of Allegheny v. ACLU*, 492 U.S. 573, 592 (1989). AERC has not so much as alleged that, by granting Thomas and Baker a constitutionally mandated exemption from the Alaska housing laws, we run the risk of "endorsing" Christianity or unnecessarily "entangling" the government in religious affairs.

[33] The fact that the exemption might, if granted, result in harm to third parties does not materially affect the Establishment Clause calculus. Establishment Clause jurisprudence concerns itself with only one kind of "harm": the stigmatization of religious minorities. *See Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J. concurring) ("Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community."); *see also Sherbert*, 374 U.S. at 409 (inquiring whether recognition of employee's right to unemployment compensation benefits would "serve to abridge any other person's religious liberties"). Here, the only palpable injury suffered by an unmarried tenant turned away by a Christian landlord for religious reasons is a marginal reduction in the number of apartment units available for rent. The "harm" to the rejected lessee, if any, is economic, not religious; as such, it is beyond the pale of the Establishment Clause.

[34] By exempting Thomas and Baker from the scope of the Alaska anti-marital-discrimination laws, we do not "establish" or otherwise endorse Christianity as an official state religion. Rather, our opinion "reflects nothing more than the governmental obligation of neutrality in the face of religious differences." *Sherbert*, 374 U.S. at 409. The Establishment Clause does not forbid what the Free Exercise Clause requires.

VII

Noble as their purpose may be, neither the Alaska statute nor the Anchorage ordinance may be enforced against land-

lords, like Thomas and Baker, who for religious reasons refuse to rent to unmarried couples.

The decision of the district court is

AFFIRMED.

APPENDIX C

VOLUME 2 of 2

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

KEVIN THOMAS and JOYCE BAKER,
Plaintiffs-Appellees,

v.

ANCHORAGE EQUAL RIGHTS COMMISSION and the MUNICIPALITY OF ANCHORAGE,
Defendants-Appellants,

and

PAULA HALEY in her official capacity as the Executive Director of the Alaska State Commission for Human Rights,
Defendant.

No. 97-35220

D.C. No. CV-95-0274-HRH and CV-95-0275-HRH

OPINION

KEVIN THOMAS and JOYCE BAKER,
Plaintiffs-Appellees,

v.

ANCHORAGE EQUAL RIGHTS COMMISSION and the MUNICIPALITY OF ANCHORAGE,
Defendants,

and

PAULA HALEY in her official capacity as the Executive Director of the Alaska State Commission for Human Rights,
Defendant-Appellant.

No. 97-35221
D.C. No.
CV-95-0274-HRH
and
CV-95-0275-HRH

Appeals from the United States District Court
for the District of Alaska
H. Russel Holland, District Judge, presiding

Argued and Submitted
July 13, 1998—Anchorage, Alaska

Filed January 14, 1999

Before: Jerome Farris, Diarmuid F. O'Scannlain and Michael Daly Hawkins, Circuit Judges.

Dissent by Judge Hawkins

HAWKINS, Circuit Judge, dissenting:

The approach of the majority ought to alarm any serious student of judicial restraint. It decides a controversy that does

not exist, in favor of parties who have suffered no harm and turns on its head the notion that state and local laws of general and uniform application are entitled to substantial deference. Tossed aside in the process is a statutory provision that has been widely upheld — in the face of challenges far more firmly grounded in fact and law than this — by state supreme courts throughout our circuit. *See Smith v. Fair Employment and Housing Comm'n*, 12 Cal. 4th 1143 (1996), *cert. denied*, 117 S. Ct. 2531 (1997); *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274 (Alaska), *cert. denied*, 115 S. Ct. 460 (1994).

Thomas & Baker seek a declaration that an Alaska statute and a companion Anchorage Ordinance are unconstitutional because they offend their religious belief that unmarried persons should not cohabitate. Thomas & Baker claim to have violated these laws in the past by refusing to rent to unmarried couples; yet they cannot provide the name of a single prospective tenant turned away for this reason. Until they filed this lawsuit, the principal agency responsible for enforcement of these measures had never even heard of them and for good reason: no one has ever filed a complaint about their rental practices. Thomas & Baker claim to be in "grave danger" of having these laws enforced against them, yet they can point to a grand total of two prosecutions in the more than twenty years since these measures have been on the books. The record is devoid of any suggestion that either Thomas or Baker has ever spoken out publicly about these laws, written a letter to any editor or even so much as shouted out in the dark of night about their impact on them.

Not only is there no reasonable threat of prosecution under these facts, Thomas & Baker have failed to show that the issues they raise are ripe for judicial decision. Ripeness is not a doctrine of convenience, something to be tossed aside when the merits of a case seem attractive. It is a serious doctrine of restraint that tells us when we should keep our powder dry and our noses out of controversies not ready to be decided.

Applied to the remarkably thin facts of this case, the doctrine would require these landlords to demonstrate how, on the record before us, there are adequate facts upon which we might conduct an effective review of their claim. Thomas & Baker simply have not met this burden.

In an effort to shore up this remarkably vacuous record, the majority elects to take judicial notice of a matter entirely outside the record of this appeal, an event in an Alaska administrative proceeding that, even though of public record while this matter was being briefed, was never mentioned by the parties seeking to take advantage of it until after this appeal was argued.[1]

Here, too, the majority simply ignores all prior teaching concerning restraint in such matters. Absent extraordinary circumstances, a reviewing court cannot supplement the record on appeal with material not before the district court. *See Reebok Int'l, Ltd. v. Marnatech Enterprises, Inc.*, 970 F.2d 552, 556 n.5 (9th Cir. 1992); *Barilla v. Ervin*, 886 F.2d 1514, 1521 n.7 (9th Cir. 1989).

There are certainly occasions when it is entirely proper for an appellate court to "notice a doctrine or rule of law from such prior case and apply that principle under the theory of stare decisis." *M/V American Queen v. San Diego Marine Construction Corp.*, 708 F.2d 1483, 1491 (9th Cir. 1983). It is equally appropriate to take judicial notice of a court's "own records in other cases, as well as the records of an inferior court in other cases." *United States v. Wilson*, 631 F.2d 118, 119-20 (9th Cir. 1980); *see also Zolg v. Kelly III*, 841 F.2d 908, 911 n.1 (9th Cir. 1988) (judicial notice of earlier state

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[1]The "event" is the filing of a citizen complaint by a student attending Alaska Pacific University, a private religious school, with the Alaska State Commission for Human Rights. *Alaska State Comm'n for Human Rights, Paula M. Haley Exec. Dir., Ex. Rel. Kristiann Rutzler v. Alaska Pacific Univ.*, ASCHR No. C96010 (filed February 3, 1997).

court memorandum opinion setting forth facts and issues); *Bryant v. Carleson*, 444 F.2d 353, 357-58 (9th Cir. 1971) (judicial notice of developments occurring in same case since taking of appeal). Nevertheless, "a court may not take judicial notice of proceedings or records in another cause so as to supply, without formal introduction of evidence, facts essential to support a contention in a cause then before it." *M/V American Queen*, 708 F.2d at 1491.

Here the majority takes notice of an administrative complaint and answer filed with the Alaska State Commission For Human Rights ("ASCHR"). Whatever these documents are, they are certainly not "generally known" nor are the allegations contained in them "capable of an accurate" and "ready determination" by an unimpeachable source. The documents are not only not part of any court proceeding of any kind, we do not know whether the ASCHR has held any hearing or issued any order or decision on the matter. In fact, this event occurred nearly two years ago and there is no evidence that any enforcement action was ever pursued or that the proceedings are in any way ongoing. Moreover, the complaint of a student at a private religious school concerning her possible eviction from married student housing bears little if any resemblance to the issues presented here.

Even if these concerns could somehow be overcome, taking judicial notice *after* briefing and argument — even though plainly available before either — violates basic notions of procedural fairness. *See, e.g., United States v. Camp*, 723 F.2d 741, 744 n.** (9th Cir. 1984) (adverse party entitled to opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed). These matters were apparently filed with the ASCHR on February 3, 1997, after the district court entered its decision on January 28, 1997. Thomas & Baker filed their notice of appeal on February 26, 1997, yet waited until July 28, 1998, long after briefing had closed and after argument of this appeal, to request judicial notice of the events in the ASCHR action. We should never

sanction such dilatory tactics and we should certainly not rely on them to bolster the argument that this matter is somehow ripe for judicial review.

I. Ripeness

We have long followed a straightforward test to determine when a case is ripe for review. A case is ripe "when all the essential facts establishing the right to declaratory relief have already occurred." *Wickland Oil Terminals v. Asarco, Inc.*, 792 F.2d 887, 893 (9th Cir. 1986). The ripeness doctrine contains both a constitutional and a prudential component. *See Portman v. County of Santa Clara*, 995 F.2d 898, 902 (9th Cir. 1993).

The constitutional component requires that "there be a 'substantial controversy . . . of sufficient immediacy and reality to warrant the issuance of a declaratory judgment,' " and is closely tied to standing requirements.[2] *Aydin Corp. v. Union of India*, 940 F.2d 527, 528 (9th Cir. 1991) (*quoting Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941)). Under this standard, Thomas & Baker " 'must demonstrate a realistic danger of sustaining a direct' " and immediate injury. *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (citation omitted); *see also Bland v. Fessler*, 88 F.3d 729, 736 (9th Cir. 1996).

Several factors determine whether a party has met this burden. For instance, a plaintiff must establish a "concrete plan" to violate the law. *See San Diego County Gun Rights Comm'n v. Reno*, 98 F.3d 1121, 1126-27 (9th Cir. 1996). While Thomas & Baker maintain they have and will continue to violate the laws by refusing to rent to unmarried cohabitants, the record discloses not a scrap of supporting evidence. Neither can point to a single prospective tenant they have turned away on account of marital status and no complaint has ever been

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[2] *See* notes 3 & 4 *infra* and accompanying text.

filed against either of them. Thomas has been a residential landlord since 1986 and yet not one person allegedly refused housing by him has ever seen fit to file a complaint.

Beyond a concrete plan to violate these laws, Thomas & Baker have failed to show a specific threat of prosecution. " 'The mere existence of a statute, which may or may not ever be applied to plaintiffs, is not sufficient to create a case or controversy within the meaning of Article III.' " *Id.* at 1126 (*quoting Stoianoff v. Montana*, 695 F.2d 1214, 1223 (9th Cir. 1983)). Thomas & Baker bear the burden of showing a threat by the government to prosecute *them*; a "general threat of prosecution is not enough." *See San Diego County Gun Rights Comm'n*, 98 F.3d at 1126-27; *see also Stoianoff*, 695 F.2d at 1223 ("[A] plaintiff must demonstrate a genuine threat that the allegedly unconstitutional law is about to be enforced against him.").

Here, the Alaska State Commission on Human Rights — the principal enforcement agency— had never even heard of Thomas or Baker before the instant action. As Thomas & Baker both admit, no state or local agency has ever threatened or brought any action against them in the past nor is any action currently pending. While " 'one does not have to await the consummation of a threatened injury to obtain preventive relief . . . the injury [must be] certainly impending.' " *Babbitt*, 442 U.S. at 298. There is simply no proof of the existence of a credible threat of prosecution here.[3]

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[3]In *American-Arab Anti-Discrimination Comm. v. Thornburgh*, 970 F.2d 501, 507-08 (9th Cir. 1992), this court found that the individual appellees faced a "real and immediate" threat of future injury from the challenged immigration law provisions. While the plaintiffs were not currently facing charges, they had once been charged with violating the provision. *Id.* at 508. The court noted that even if they had not been charged in the past, standing was proper because of evidence that the government was actively prosecuting under the provisions. *Id.* As discussed in the next paragraph, the history of past and present prosecutions in this case is lacking.

The history of past prosecution is a relevant factor in assessing whether such a "realistic threat" exists. *See San Diego County Gun Rights Comm'n*, 98 F.3d at 1128; *Adult Video Ass'n. v. Barr*, 960 F.2d 781, 785 (9th Cir. 1992), *rev'd on other grounds*, 509 U.S. 917 (1993), *opinion adopted in part*, 41 F.3d 503 (9th Cir. 1994). While not dispositive, the government's willingness to use a challenged statute is inextricably intertwined with an assessment of whether plaintiffs face a "genuine threat of prosecution." *See San Diego County Gun Rights Comm'n*, 98 F.3d at 1128. Here, the Alaska statute was enacted in 1975 and the Anchorage ordinance adopted in 1976. *See Foreman v. Anchorage Equal Rights Comm'n.*, 779 P.2d 1199, 1202 (Alaska 1989). In 1976, the Alaska Supreme Court interpreted the statute as an affirmative mandate. *See Hotel, Motel, Restaurant, Construction Camp Employees & Bartenders Union v. Thomas*, 551 P.2d 942, 945 (Alaska 1976). In the 22 years since that decision, however, the record reveals a grand total of two actions against parties based on complaints of marital status discrimination and only one of those cases involved a party similarly situated to Thomas & Baker. *See Swanner*, 874 P.2d at 274; *Foreman*, 779 P.2d at 1199. The record of enforcement undermines the claim that Thomas & Baker face a "real and immediate" threat of prosecution.[4]

On this point, the majority's quest to find Thomas &

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[4]In *Bland*, 88 F.3d at 729, this court found the plaintiff had standing even though the statute had yet to be enforced against anyone. Unlike the statute in *Bland* which was only six years old, the statute here was enacted over twenty-two years ago. Moreover, in *Bland*, the plaintiff's own actions supported his contention that the controversy was "immediate and real" so as to confer standing. Whereas the plaintiff in *Bland* complied with the law and immediately filed suit, Thomas and Baker sought judicial intervention after purporting to have violated the law for years. Thus, Thomas and Baker's own actions undermine the contention that they face a "realistic danger" of prosecution. *Id.* at 736. Therefore, it would seem imprudent and premature for this court to adjudicate what can be considered an "abstract disagreement." *See Portman*, 995 F.2d at 902.

Baker's claims justiciable, results in a mischaracterization of case law. In *San Francisco County Democratic Central Comm. v. Eu*, 826 F.2d 814, 822 (9th Cir. 1987), this court found the claims at issue justiciable, in part, because "notwithstanding a record of non-enforcement . . . the record did not show that the statutes had been 'commonly and notoriously' violated." Indeed, "plaintiffs' uncontroverted affidavits show[ed] that they [had] consistently, if reluctantly, obeyed the statute."[5] Thus, in *Eu*, non-enforcement of the statute was of no import because an enforcement action would only be triggered in response to a violation. Consequently, the record of non-enforcement revealed nothing about whether there was a "realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement." *Id.* at 821.

Here, however, non-enforcement of the anti-discrimination statute is relevant to whether Thomas & Baker face a "credible threat of prosecution." *See Darring v. Kincheloe*, 783 F.2d 874, 877 (9th Cir. 1986). Unlike the plaintiffs in *Eu*, Thomas & Baker claim to have violated the anti-discrimination laws for over a decade; yet there has never been so much as a threat of enforcement against them. While the majority attempts to minimize Thomas & Baker's actions, their continued violation of the laws strongly suggests that these laws are in fact "commonly and notoriously" violated.[6] Thus, a lack of enforcement for over twenty years in the face of repeated violations distinguishes *Eu* and undercuts Thomas & Baker's claim that their fear of prosecution is more than speculative. *See Darring*, 783 F.2d at 877.[7]

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[5]Virtually all those affected by the statute were plaintiff's in *Eu*. Thus, it was quite possible that the statute in question had never been violated.

[6]Assuming that Thomas & Baker have flagrantly violated the anti-discrimination laws for over a decade, it is also quite possible that other landlords have done the same and yet there has only been two enforcement actions in 22 years.

[7]The majority also relies on *Adult Video Assoc. v. Barr*, 960 F.2d 781 (9th Cir. 1992), *rev'd on other grounds*, 509 U.S. 917 (1993), *opinion*

To determine whether Thomas & Baker's claims are ripe, moreover, requires evaluating the two prudential components: "(1) whether the issues are fit for judicial determination, and (2) whether the parties will suffer hardship if [the court] declines to consider these issues." *San Diego County Gun Rights Comm'n*, 98 F.3d at 1132; *see also Lee v. Oregon*, 107 F.3d 1382, 1391 (9th Cir. 1997).

On the second of these factors — whether Thomas & Baker will suffer a hardship if jurisdiction were declined — the majority is strangely silent. Our case law is clear, however, that the threat of a criminal penalty must be real and specific. *See Freedom to Travel Campaign v. Newcomb*, 82 F.3d 1431, 1435 (9th Cir. 1996). Where, as here, there is no threat of criminal prosecution — specific or otherwise — we must decline to exercise jurisdiction. *See San Diego County Gun Rights Comm'n*, 98 F.3d at 1132-33. This is particularly true where delayed resolution of the issues would not foreclose relief. *See American-Arab Anti-Discrimination Comm.*, 970 F.2d at 511-12, (*quoting Duke Power Co. v. Carolina Envt'l. Study Group*, 438 U.S. 59, 82 (1978)).

Thus, where there is an adequate opportunity and procedures are available to raise such claims — as would exist in the face of an actual enforcement action — the mere potential for criminal or civil action is not considered a sufficient hardship. *See Lee*, 107 F.3d at 1391-92 (hardship insufficient where actual — not intended — noncompliance would produce an enforcement action where validity of statute could be challenged); *San Diego County Gun Rights Comm'n*, 98 F.3d at 1133 (opportunity to raise constitutional objections if and

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adopted in part, 41 F.3d 503 (9th Cir. 1994), to conclude that non-enforcement of the anti-discrimination laws is not a barrier to justicability. However, in *Adult Video Assoc.*, the government actively enforced the RICO obscenity provision against similarly situated individuals and could enforce the pre-trial seizure provision at any time in any case.

when criminal prosecution initiated); *American-Arab Anti-Discrimination Comm.*, 970 F.2d at 512 (exercise of jurisdiction prior to enforcement premature).

Not only is it highly questionable whether Thomas or Baker face a "specific threat" of any kind of enforcement action, a violation of the Alaska statute is a misdemeanor. *Alaska Stat.* § 18.80.270. And the law most likely to be enforced here, *Anchorage Municipal Code*, tit.5, § 30, provides no specific penalty at all for violations. At most, Thomas & Baker would be subject to a compliance order. To the extent a compliance order could even be described as a penalty, it is of a wholly different magnitude than the sanction at risk in cases where we have declined jurisdiction. *See San Diego County Gun Rights Comm'n*, 98 F.3d at 1124 (felony weapons charges); *American-Arab Anti-Discrimination Comm.*, 970 F.2d at 511-12 (deportation).

Finally, Thomas & Baker will have ample opportunity to raise their constitutional challenges in the event that the Alaska statute or Anchorage ordinance is actually enforced against them. *See Swanner*, 874 P.2d at 274. Thomas & Baker plainly fail to establish sufficient hardship to justify our exercise of jurisdiction.

II. The Hybrid-Rights "Exception"

The majority result has it that the First Amendment bars the application of a neutral, generally applicable law to religiously motivated actions.[8] This notion arises out of language

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[8]The notion that individual religious belief becomes the paramount law is precisely what the Supreme Court rejected in *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 888, 890 (1989) (citations omitted):

> [I]f "compelling interest" really means what it says, many laws would not meet the test. Any society adopting such a system would be courting anarchy, but that danger increases in direct

in *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 872 (1989). But *Smith* provides no refuge:

> The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech or of the press.

494 U.S. at 881 (citations omitted). First, there is real doubt whether the hybrid-rights exception even exists. The Supreme Court was less than clear in outlining the nature and consequences of such an exception. *See id.* at 881-88. While a number of circuits (including our own) have implicitly recognized such an exception, the Supreme Court itself has never explicitly held that it exists. *See Swanson v. Guthrie Indep. School Dist. No. I-L*, 135 F.3d 694 (10th Cir. 1998); *Equal Employment Opp. Comm'n v. Catholic Univ. of America*, 83 F.3d 455 (D.C. Cir. 1996); *American Friends Serv. Comm. Corp. v. Thornburgh*, 961 F.2d 1405 (9th Cir. 1991); *Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464 (8th Cir. 1991).

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proportion to the society's diversity of religious beliefs, and its determination to coerce or suppress none of them. Precisely because we are a cosmopolitan nation made up of people of almost every conceivable religious preference, and precisely because we value and protect religious divergence, we cannot afford the luxury of deeming presumptively invalid, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order. The rule respondents favor would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind . . . [leaving] a system in which each conscience is a law unto itself.

The Supreme Court's precise holding in *Smith* is that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" 494 U.S. at 879. After alluding to the possibility of a hybrid-rights exception, *Smith* states: "[t]he present case does not present such a hybrid situation." *Id.* at 882. Thus, because *Smith* itself was not a hybrid-rights case, the paragraph in *Smith* purporting to carve out a hybrid-rights exception is dicta; simply an attempt to distinguish other free exercise cases from the facts in *Smith*.

Although the majority is correct that this panel must follow *American Friends*, it is simply wrong to characterize the Sixth Circuit's approach as "ignoring" the hybrid-rights exception. The Sixth Circuit did not ignore *Smith*, but instead found that "the Smith court did not explain how the standard under the Free Exercise Clause would change depending on whether other constitutional rights were implicated." *Kissinger v. Board of Trustees of the Ohio State Univ., College of Veterinary Medicine*, 5 F.3d 177, 180 (6th Cir. 1993). Then, the court determined that "until the Supreme Court holds that legal standards under the Free Exercise Clause vary depending on whether other constitutional rights are implicated, we will not use a stricter legal standard than that used in Smith to evaluate a generally applicable, exceptionless state regulation under the Free Exercise Clause." *Id.* This would appear to be the soundest approach and the one most consistent with principles of judicial restraint. A court need not address the cases *Smith* did not overrule (the hybrid-rights cases) unless or until a parallel case is presented. Here, each of these cases[9] identified in *Smith* as possible hybrid-rights matters can be

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[9]These cases are *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Follett v. McConnick*, 321 U.S. 573 (1944); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

readily distinguished from this case and limited to their facts.[10] Given the uncertainty in this area, the Sixth Circuit's approach is quite prudent.

Were we compelled to reach the merits here, our prior decision in *American Friends* would make it necessary to define precisely what the Supreme Court meant in *Smith* when it referred to the notion of a hybrid-rights exception. The D.C. and First Circuits adopt a view that a proper hybrid-rights claim would have to be one that is "independently viable." *Catholic Univ. of America*, 83 F.3d at 467; *Brown v. Hot, Sexy, and Safer Prod.*, 68 F.3d 525, 539 (1st Cir. 1995). Such an approach necessarily requires that the companion claim be one capable of carrying its own weight. As will be seen from the discussion below, Thomas & Baker simply cannot meet such a requirement.

Nor does the majority opinion help fit Thomas & Baker's claim within *Smith*'s hybrid-rights umbrella. The majority's reliance on *Swanson* is unavailing. There the Tenth Circuit embraced a "colorable claim" approach. A careful reading of *Swanson*, however, suggests that the Tenth Circuit has yet to affirmatively embrace a particular reading of *Smith*. *See Swanson*, 135 F.3d at 700 ("Whatever the Smith hybrid-rights theory may ultimately mean, we believe that it at least requires a colorable showing of infringement of recognized and specific constitutional rights").

Nor is there support in the case law for the majority's application of strict scrutiny to hybrid-rights cases. As the Sixth Circuit noted, the Supreme Court in *Smith* did not announce a different test for hybrid-rights cases. *See Kissinger*, 5 F.3d at 180. Even the cases which the Supreme Court cited as involving "hybrid rights" did not explicitly refer to or invoke

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[10] *Follett*, *Murdock*, and *Cantwell* can be explained on free speech grounds alone, while *Yoder* and *Pierce* can be interpreted as decided on substantive due process grounds.

strict scrutiny or a compelling government interest test. In *Boerne v. Flores*, 117 S.Ct. 2157, 2161 (1997), the Court observed that "the only instances where a neutral, generally applicable law had failed to pass constitutional muster . . . were cases in which other constitutional protections were at issue." Thus, the Court in no way embraced the application of strict scrutiny for such cases. Moreover, the majority's reliance on the line of cases employing the test outlined in *Sherbert v. Verner*, 450 U.S. 707 (1981) is seriously misplaced. The Supreme Court in *Smith* specifically stated that "[w]e have never invalidated any governmental action on the basis of the Sherbert test except the denial of unemployment compensation. . . . In recent years we have abstained from applying the Sherbert test (outside the unemployment compensation field) at all." 494 U.S. at 884; *see also Swanson*, 135 F.3d at 701.

III. Fifth Amendment Takings Claim

The majority's opinion that Thomas & Baker present a colorable Fifth Amendment Takings claim suffers from a host of fatal flaws. First, Thomas & Baker do not have standing to assert a Fifth Amendment Takings claim. It is well settled that the right to exclude is ordinarily among a property owner's "bundle of rights." *See Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 82 (1980); *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979). Under this theory, an individual's property rights are defined by the bundle of rights acquired when title to the property is obtained. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027-28 (1992); *see also M & J Coal Co. v. United States*, 30 Fed. Cl. 360, 367 (1994) ("[I]f at the time of sale an existing law or regulation precludes a certain use, that use was never a 'stick' in the purchaser's 'bundle of rights.' "). This court has held that if a property owner does not own property at the time a statute is enacted and the taking occurs, no injury sufficient to make a facial constitutional challenge exists. *See Hoeck v. City of Portland*, 57 F.3d 781, 788-89 (9th Cir. 1995); *Carson Har-*

bor Village Ltd. v. City of Carson, 37 F.3d 468, 476 (9th Cir. 1994) *overruled on other grounds*, *WMX Tech., Inc. v. Miller*, 104 F.3d 1133 (9th Cir. 1997); *see also Lucas*, 505 U.S. at 1027-28 ("[T]he State . . . may resist compensation only if . . . the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with.").

Here, the statute was passed in 1975 and enacted in 1976. Thomas did not enter the residential landlord business until 1986.[11] The law charges Thomas with knowledge of the anti-discrimination restrictions placed on his bundle of property rights at the time he entered the rental market. Therefore, at the time he embarked on this business venture and acquired his residential properties, his bundle of property rights did not include the right to exclude potential tenants on the basis of marital status. Since Thomas never obtained an absolute, unqualified right to exclude others from his property, he cannot now complain that this "stick" was taken. Consequently, he has not suffered injury and as such lacks standing to bring this challenge.

Second, the majority opinion mistakenly relies on Supreme Court cases involving actual, physical takings.[12] For example, the Supreme Court's decision in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), stands for the straightforward proposition that *any* physical invasion, whether it increases or decreases the economic value of the owner's property, constitutes a taking that requires compensation. *Loretto* addresses issues squarely within the area of

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[11]The record does tell us when Baker entered the residential landlord business. Without this fact, this court cannot assess Baker's standing. This is yet another reason why this case is not ripe for review.

[12]While the majority opinion outlines the three factors that govern a regulatory takings analysis, they do not rigorously apply it to the facts of this case. Instead, the majority opinion finds that Thomas and Baker have presented a colorable Fifth Amendment claim by relying entirely on a single sentence from the Supreme Court's dicta in *Phillips v. Washington Legal Found.*, 118 S. Ct. 1925, 1933 (1998).

physical takings, not regulatory taking which is at issue here. More importantly, *Loretto* explicitly recognizes that its holding would not affect the State's ability to regulate and adjust the landlord-tenant relationship. *See id.* at 440 ("This Court has consistently affirmed that States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular *without* paying compensation for all economic injuries that such regulation entails.") (emphasis added). Moreover, in *Phillips v. Washington Legal Found.*, 118 S. Ct. 1925, 1933 (1998), the sole question before the Court was whether the item at issue constituted property. Thus, the Court's statement that "property is more than economic value" simply went to underscore that point. It was not presented as an alternative method of assessing whether the State has taken the property, the issue presented here.

Finally, the theme consistently attending the regulatory takings cases is that the government action deprived the property owner of investment-backed expectations.[13] Indeed, the very heart of the regulatory takings doctrine is that the regulation has gone "too far" by depriving the owner of the "economically beneficial and productive use of land." *Lucas*, 505 U.S. at 1015. Here, the Alaska statute does not adversely impact the economic interests of someone in Thomas's shoes who entered the residential rental market with full knowledge of the restraints on his right to exclude. Thus, it cannot be said that Thomas has been the victim of a government taking.

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[13]In *Andrus v. Allard*, 444 U.S. 51 (1979), the Supreme Court held that a regulation banning the sale of protected bird parts did not constitute a taking. In reaching its decision, the Court noted that a reduction in the economic value of property was not the *sole* measure of a regulatory takings claim. *Id.* at 66. However, the Court stated that even when a regulation denies an owner one of the "sticks" traditionally found in his bundle of property rights, such as the right to sell, a takings claim does not necessarily lie. *Id.* at 66-67.

IV. First Amendment Free Speech

In assessing the viability of Thomas & Baker's free speech claim, the majority unnecessarily meanders through the minefields of current commercial speech doctrine, ultimately reaching the remarkable conclusion that "the expression forbidden by the Alaska anti-discrimination laws is, at its essence, religious speech." (Majority Opinion at 410). This reasoning suffers from two basic problems: (1) it is at odds with all established precedent; and (2) it runs afoul of even the most basic notions of protected religious expression.

The distinction between commercial and noncommercial speech is the subject of significant constitutional debate. One thing is clear, however: under the Supreme Court's current jurisprudence, commercial speech is afforded a lesser degree of protection from governmental regulation than some other forms of expression. *See United Reporting Publishing Corp. v. California Highway Patrol*, 146 F.3d 1133, 1136 (9th Cir. 1998).

But what constitutes commercial speech? To be sure, no mathematical formula distinguishes commercial from noncommercial speech. *Id.* at 1137. Nevertheless, the majority's characterization of commercial speech is just plain wrongheaded. Despite the uncertainty created by *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993), the Supreme Court has refused to explicitly reject the doctrine. Moreover, the Court has yet to limit the parameters of commercial speech to "speech that does nothing more than propose a commercial transaction." *Id.* at 421. A close reading of *Discovery Network* inextricably leads to the conclusion that the Court's discussion on this point is dicta. *Id.* at 416, 424.[14]

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[14]In *Discovery Network*, the parties conceded that the speech at issue was commercial. *See id.* at 416 ("[R]espondents do not challenge their characterization as commercial speech."). *See also id.* at 424 ("[F]or the purposes of deciding this case, we assume that all of the speech barred . . . is what we have labeled 'core' commercial speech.").

The majority's interpretation of *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 67 (1983), is equally suspect. While *Bolger* provides something of a framework for discerning commercial from noncommercial speech, it is only a partial roadmap. The *Bolger* indicators are *not* dispositive. *See id.* at 68 n. 14. Critical to this analysis is a common sense evaluation of the context in which the speech occurs. *See Ohralik v. Ohio State Bar Assoc.*, 436 U.S. 447, 455-56 (1978) ("We have not discarded the 'common-sense' distinction between speech proposing a commercial transaction . . . and other varieties of speech."); *United Reporting Publishing Corp.*, 146 F.3d at 1137 ("[W]e must examine the disputed communication in light of its surrounding circumstances."). The majority's opinion is devoid of such an examination.

Notwithstanding the seeming inapplicability of the *Bolger* factors, a common sense analysis strongly suggests that these anti-discrimination laws do not proscribe speech beyond that directly associated with a commercial transaction — the rental of real property. Indeed, canons of statutory construction counsel against the literal, acontextual reading urged by the majority. *See Norfolk & Western Rwy. Co. v. American Train Dispatch Ass'n*, 499 U.S. 117, 129 (1991) ("[W]hen a general term follows a specific one, the general term should be understood as a reference to subjects akin to the one with specific enumeration."); *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) ("[T]he meaning of statutory language plain or not, depends on context."); *Schreiber v. Burlington Northern, Inc.*, 472 U.S. 1, 8 (1985) ("[W]ords grouped in a list should be given related meaning.").

Here, the anti-discrimination laws were specifically designed to eradicate discrimination in housing. *See* Alaska Stat. § 18.80.240; Anchorage Mun. Code § 5.20.020. To that end, the statutory language is explicitly aimed at communications disclosed during the rental of real property. There is absolutely no indication that the laws were intended or drafted to squelch religious or political expression. The laws in no

way sanction or inhibit Thomas or Baker from speaking, writing, or publishing their views on cohabitation or their opinion of the anti-discrimination laws. Instead, just as Thomas & Baker may not use speech to discriminate on the basis of race or gender, *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 388 (1973); *Ragin v. New York Times Co.*, 923 F.2d 995 (2d Cir. 1991), likewise under the Alaska and Anchorage laws they may not employ speech to discriminate on the basis of marital status. Thus, the most prudent and reasonable interpretation of these laws is that they restrict commercial speech and as such are subject to the four-part standard laid down in *Central Hudson Gas and Electric Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566 (1980).

V. Conclusion

The majority chooses the wrong set of facts to lead to an unprecedented and unnecessary result. In doing so, it addresses some of the murkiest areas of constitutional law. Its potential for harm will be seen when a landlord in this circuit refuses, on the basis of religious beliefs as honestly and firmly held as those of Thomas & Baker, to rent or sell housing to divorced individuals, interracial couples, victims of domestic abuse seeking shelter, or single men or women living together simply because they cannot afford to do otherwise, in spite of state and local laws forbidding such discrimination. Surely to say anything that would suggest such a proposition, we could wait for a case presenting a real controversy.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

No. A95-0274-CV (HRH)
[Consolidated with No. A95-0275-CV (HRH)]

KEVIN THOMAS, et al.,

Plaintiffs,

vs.

ANCHORAGE EQUAL RIGHTS COMMISSION, et al.,

Defendants.

GARY and JOYCE BAKER,

Plaintiffs,

vs.

ANCHORAGE EQUAL RIGHTS COMMISSION, et al.,

Defendants.

FILED SEP 20 1996

ORDER

Plaintiffs' Motion and Defendants'
Cross-Motions for Summary Judgment

PROCEDURAL HISTORY

Plaintiffs Kevin Thomas ("Thomas") and Gary and Joyce Baker ("Bakers") move for summary judgment.[1] Defendants

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[1] Clerk's Docket No. 18A and No. 22.

Anchorage Equal Rights Commission ("AERC"), Municipality of Anchorage, and Paula Haley make a cross-motion for summary judgment.[2] All motions are opposed. Oral argument was heard on Friday, August 9, 1996.[3]

After reviewing the briefs and memoranda in support of and against the plaintiffs' and defendants' motions and cross-motions for summary judgment, the court concludes that a partial disposition is the best avenue to effectively and efficiently resolve the issues in this case. Thus, the court will determine by this order justificiability and Eleventh Amendment issues, separate from other issues raised by the parties.

FACTS

Plaintiffs own multiple residential rental properties in Anchorage, Alaska. They rent to people without regard to race, religion, gender, or marital status. However, plaintiffs will not rent their properties to unmarried couples based solely on their Christian beliefs. Thomas has in the past refused to rent to an unmarried couple, and all plaintiffs assert that they will not rent to unmarried couples in the future.

Both the State of Alaska and the Municipality of Anchorage have anti-discrimination in housing statutes which prohibit landlords from discriminating against tenants based on marital status. Currently, there are no pending complaints against plaintiffs, nor is the AERC or the Alaska State Commission on Human Rights ("ASCHR") conducting any investigation into plaintiffs' activities.

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[2] Clerk's Docket No. 25 and No. 26.

[3] Clerk's Docket No. 38.

Plaintiffs are devout Christians whose religious beliefs are founded upon the Bible. Thomas has attended and served the Christian church working with children for a number of years. The Bakers have been members of the Christian church for more than fifteen years. Gary Baker, in particular, has served as an elder, part-time pastor, and lay pastor for the church in Tanana, Alaska.

Plaintiffs believe that it is a sin for a man and woman to live together prior to marriage. They believe "cohabitation . . . constitutes the sin of fornication and is grievously offensive to God."[4] They also believe that if they were to assist or facilitate someone else's cohabitation, they would be committing a sin themselves, and would therefore be "hypocrite[s] in the eyes of their [his] fellow Christians."[5] Plaintiffs' beliefs are "rooted . . . within Christianity . . . extend[ing] back to the Old Testament,[6] and includes the New Testament,[7] the teachings of the Lord Jesus Christ,[8] the teachings of the Apostle Paul,[9] the teaching[s] of the Apostle Peter,[10] and the theology of the

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[4] Clerk's Docket No. 18A at 5; Clerk's Docket No. 37 at 6.

[5] Clerk's Docket No. 18A at 5; Clerk's Docket No. 37 at 6.

[6] *Exodus* 22:16; *Leviticus* 19:20; *Deuteronomy* 22:13-21, 23:17; *Proverbs* 2:16, 5:3-6, 6:24-29, 7, 29:3; *Ecclesiastes* 7:26; *Hosea* 4:11.

[7] *Acts* 15:19-20; *Jude* 7: *Revelation* 2:14, 21:18, 22:15.

[8] *Matthew* 15:16-20; *Mark* 7:18-23.

[9] *Romans* 1:29: I *Corinthians* 5:9-11, 6:9; *II Corinthians* 12:21; *Galatians* 5:19-21; *Ephesians* 5:5; *Colossians* 3:5-6; I *Thessalonians* 4:3; I *Timothy* 1:8-11; Hebrews 13:4.

[10] I *Peter* 4:1-6.

Reformation leader John Calvin.[11][12]

Plaintiff's believe their Christian beliefs should "be lived out in every aspect" of their lives, including commercial activities.[13] They fear, based on past enforcement of the applicable anti-marital status discrimination laws, that their refusal to rent to unmarried couples pursuant to their religious convictions may result in actions against them by defendants.

DISCUSSION

Plaintiffs seek prospective declaratory and injunctive relief against defendants pursuant to 42 U.S.C. § 1983; 42 U.S.C. § 2000bb-1(c); and 28 U.S.C. §§ 2201 and 2202. They "seek to prohibit the defendants from acting to enforce Alaska and Anchorage anti-marital status discrimination laws, AS 18.80.240[14]

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[11] John Calvin, *Calvin's Commentaries: The Epistle of Paul to the Romans and to the Thessalonians* (Ross Mackenzie trans.).

[12] Clerk's Docket No. 18A at 5-6; Clerk's Docket No. 37 at 6-7.

[13] Clerk's Docket No. 18A at 6; Clerk's Docket No. 37 at 7.

[14] *Sec. 18.80.240. Unlawful practices in the sale or rental of real property.* It is unlawful for the owner, lessee, manager, or other person having the right to . . . rent real property

(1) to refuse to . . . rent the real property to a person because of sex, marital status, changes in marital status, pregnancy, race, religion, physical or mental disability, color, or national origin; however, nothing in this paragraph prohibits the sale, lease, or rental of classes of real property commonly known as housing for "singles" or "married couples" only;

(2) to discriminate against a person because of . . . marital status . . . in a term, condition, or privilege relating to the . . . rental of real property;

. . . .

(3) to make a written or oral inquiry or record of the . . . marital status . . . of a person seeking to . . . rent real property;

. . . .

(5) to represent to a person that real property is not available for . . . rental . . . when in fact it is so available . . . because of the . . . marital status . . . of that person or of any person associated with that person[.]

and AMC 5.20.020,[15] against them or similarly situated landlords so as to mandate the rental of residential property to unmarried cohabitors in disregard of sincere religious convictions."[16]

Justiciability of Plaintiffs' Claims

Justiciability is a term of art used to describe the extent of the power of the federal courts. Article III of the United States Constitution makes it clear that the power of the federal courts

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[15] *AMC 5.20.020 Unlawful practices in the sale or rental of real property.*

Except in the individual home wherein the renter or lessee would share common living areas with the owner, lessor, manager, agent, or other person, it is unlawful for the owner, lessor, manager, agent or other person having the right to sell, lease, rent or advertise real property:

A. To refuse to . . . rent the real property to a person because of . . . marital status[;]

B. To discriminate against a person because of . . . marital status . . . in a term, condition or privilege relating to the use, sale, lease or rental of real property;

C. To make a written or oral inquiry or record of the . . . marital status . . . of a person seeking to . . . rent real property;

D. To offer, solicit, accept, use or retain a listing of real property with the understanding that a person may be discriminated against in a real estate transaction or in the furnishing of facilities or sources in connection therewith because of a person's . . . marital status[;]

E. To represent to a person that real property is not available for . . . rental . . . when in fact it is available, or to refuse a person the right to inspect real property, because of the . . . marital status . . . of that person or because of any person associated with that person;

. . . .

G. To circulate, issue or display, make, print or publish, or cause to be made or displayed, printed or published, any communication, sign, notice, statement or advertisement, with respect to the use, sale, lease or rental of real property that indicates any preference, limitation, specification or discrimination based on . . . marital status[.]

[16] Clerk's Docket No. 37 at 2.

is limited to "actual 'cases' and 'controversies.'" *Allen v. Wright*, 468 U.S. 737, 750 (1984). Justiciability has been interpreted to mean, *inter alia*, that the federal courts have power to hear "cases" and "controversies" that are ripe and where the plaintiffs have standing. *See United Public Workers of America v. Mitchell*, 330 U.S. 75, 89 (1947); *see also, Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-60 (1992). The adoption of the Declaratory Judgment Act does not alter the justiciability requirements of Article III. *Aetna Life Insurance Co. v. Haworth*, 300 U.S. 227, 240 (1937).

A. Standing

Standing to sue means that a person has a sufficient stake in the matter contested to obtain judicial resolution. *See Sierra Club v. Morton*, 405 U.S. 727, 731-32 (1972). A plaintiff has standing for purposes of constitutional justiciability if the oft-cited requirements reiterated in *Lujan* are satisfied.

> First, the plaintiff must have suffered an "injury in fact"– an invasion of a legally protected interest which is (a) concrete and particularized, see [*Allen*, 468 U.S. at 756]; *Warth v. Seldin*, 422 U.S. 490, 508 (1975); *Sierra Club v. Morton*, 405 U.S. 727, 740-741, n.16 (1972); and (b) "actual or imminent, not 'conjectural' or "hypothetical,'" *Whitmore* [v. Arkansas], 495 U.S. [149] at 155 (*quoting Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983)). Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 41-42 (1976). Third, it must be "likely," as

> opposed to merely "speculative," that the injury will be "redressed by a favorable decision." *Id.*, at 38, 43.

Lujan, 504 U.S. at 560-61 (footnote and parallel citations omitted).

The Supreme Court of the United States has held that for a plaintiff to show an injury in fact, he must show, at a minimum, "some 'threatened or actual injury resulting from the putatively illegal action. . . .'" *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 392 (1987), (*quoting Warth v. Seldin*, 422 U.S. 490, 499 (1975)); *see aso Linda R.S. v. Richard D.*, 410 U.S. 614, 617 (1973); *Data Processing Services v. Camp*, 397 U.S. 150, 151-54 (1970).

In *American Booksellers*, the Virginia legislature passed a statute declaring it "'unlawful for any person . . . to knowingly display for commercial purpose in a manner whereby juveniles may examine and peruse' visual or written material that 'depicts sexually explicit nudity, sexual conduct or sadomasochistic abuse and which is harmful to juveniles.'" *American Booksellers*, 484 U.S. at 386, *see also* Va. Code § 18.2-391(a) (Supp. 1987). Plaintiff in that case was a booksellers association which alleged that the First Amendment right of book buyers was being infringed. The Court held that the plaintiffs satisfied the standing requirements because: (1) the law was aimed at them, and (2) that if the plaintiffs' interpretation of the statute was correct, they would have to take significant and costly compliance measures or risk criminal prosecution.

American Booksellers is closely analogous to the plaintiffs' situation in the present case. The Alaska and Anchorage anti-discrimination statutes are aimed at landlords like the Bakers and Thomas and other persons similarly situated. Unlike the Virginia statute, the statutes at issue in this

case have been interpreted by the Alaska Supreme Court, which has held that the prohibition against discrimination based on marital status contained in AMC 05.20.020 "protect[s]" the rights of "unmarried couples." *Foreman v. Anchorage Equal Rights Commission*, 779 P.2d 1199, 1201-1203 (Alaska 1989). Similar to *American Booksellers*, the Bakers' and Thomas' compliance with the Alaska and Anchorage statutes would require significant measures; while non-compliance would subject plaintiffs to the risk of criminal prosecution. Significant compliance measures in this case would include plaintiffs giving up their rental properties entirely or dispensing with their Christian beliefs.

The Ninth Circuit Court of Appeals reiterated in *Adult Video Ass'n v. Barr*, 960 F.2d 781, 785 (9th Cir. 1992), *vacated and remanded, Reno v. Adult Video Ass'n*, 509 U.S. 917, 113 S.Ct. 3028 (1993), *readopted in part, Adult Video Ass'n v. Reno*, 41 F.3d 503, 504 (1994), that an "injury in fact" includes "a 'reasonable threat of prosecution for conduct allegedly protected by the Constitution.'" *Polykoff v. Collins*, 816 F.2d 1326, 1331 (9th Cir. 1987), *quoting Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*, 477 U.S. 619, 625 n. 1 (1986). Another Ninth Circuit case requires plaintiffs who are not currently charged with violation of a challenged statute to show that the threat of future injury is both "real and immediate." *American-Arab Anti-Discrimination Committee v. Thornburgh*, 940 F.2d 445, 450 (9th Cir. 1991) (*American-Arab I*); *rehearing*, 970 F.2d 501, 507 (9th Cir. 1991) (*American-Arab II*).

In *Barr*, plaintiffs challenged the constitutionality of the federal Racketeer Influenced and Corrupt Organizations Act's ("RICO") criminal provisions. *See* 18 U.S.C. §§ 1961-1968. In that case, the plaintiffs each alleged that "it either produce[d], distribute[d], s[old] or consume[d] erotic videotapes." *Barr*,

960 F.2d at 785. Each also alleged that "its activities either could subject it to RICO prosecution or are chilled by the threat of such prosecution." *Id.* The court found that "the government's active enforcement of RICO's obscenity provision against other videotape distributors demonstrates that the threat of prosecution is real." *Id.* The court further concluded that plaintiffs had an actual injury because there is an alleged "immediate and tangible chill on distribution, as well as on a consumer's and a retailer's ability to obtain erotic and sexually explicit videotapes." *Id.*

Similarly, the court of appeals held that the individual appellees in *American-Arab* had standing. The appellees had been charged in the past with criminal violations under 8 U.S.C. §§ 1251(a)(2), 1251(a)(6), and 1251(a)(9).[17] The court concluded they had a threat of injury which was more than merely hypothetical or conjectural.

In dicta, the court stated that had appellees "not already been charged with violating . . . the challenged provisions," they would nonetheless have standing. *American-Arab I*, 940 F.2d at 450. The court reasoned that the individual appellees had standing for justiciability purposes because:

> The challenged statute . . . is regulatory and proscriptive in nature, *see* [*Laird v. Tatum*,] 408 U.S. [1,] 11, 92 S.Ct. [2318,] 2334, and the penalty for noncompliance is high. *See Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 392-93, 108 S.Ct. 636, 642, 98 L.Ed.2d 782 (1988). Moreover, the individual appellees fall within the class of persons whose conduct the statute proscribes, *see Doe v. Bolton*, 410 U.S. 179, 188, 93 S.Ct. 739, 745, 35

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[17] Charges were dropped against the individual appellees for tactical reasons. *American-Arab I*, 940 F.2d at 450.

> L.Ed.2d 201 (1973), and against whom the government has already instituted proceedings under the challenged provisions. *See Steffel [v. Thompson,]* 415 U.S. [452,] 459, 94 S.Ct. [1209,] 1215 [(1974)].

American-Arab I, 940 F.2d at 450-51 (footnote omitted).

Plaintiffs in this case allege facts similar to those in *Barr* and *American-Arab*. They allege an unconstitutional chill on the exercise of their Christian beliefs by the threat of enforcement of the Alaska and Anchorage anti-discrimination statutes. The threat of prosecution prevents them from turning away unmarried couples as potential tenants or requires them to give up their rental properties. Despite defendants' contentions, the threat of enforcement is real. This court is mindful of the fact that the statutes at issue in this case have been enforced against discriminating landlords. *See Foreman*, 779 P.2d 1199; *see also Swanner v. Anchorage Equal Rights Commission*, 874 P.2d 274 (Alaska 1994). Further, the state statute has been interpreted as a mandate for the search and eradication of the discrimination conduct.[18] The ASCHR, or its executive director, has been given the authority to file a complaint of its own accord if it becomes aware of discriminatory conduct, regardless of whether the prospective tenants file a complaint. Although the executive director's authority is discretionary, such discretion does not eliminate the threat of enforcement of the anti-discrimination statute. Plaintiffs have made it known that they will continue to act in

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[18] The Alaska Supreme Court made an in-depth investigation into the legislative history of Title 18, Chapter 80, in *Hotel, Motel, Restaurant, Construction Camp Employees & Bartenders Local 879 v. Thomas*, 551 P.2d 942 (Alaska 1976). The court found that "the legislature intended the Commission [ASCHR] to be more than a simple complaint-taking bureau; the statutory scheme constitutes a mandate to the agency to seek out and eradicate discrimination in . . . the sale, lease, or rental of real property." *Id.* at 945.

a manner inconsistent with the statutes. The ASCHR is aware of their activities, thus plaintiffs are under a threat of prosecution. By the decisions of the Supreme Court and the Ninth Circuit, plaintiffs allege an injury in fact.[19]

There are two other elements under the requirements of standing reiterated in *Lujan*: that the alleged injury is the result of the statutes at issue and their expected enforcement, and that plaintiffs' injury can be remedied by a favorable decision by this court. Neither of these remaining two requirements is in dispute. This court finds that plaintiffs have satisfied the three elements of standing for justiciability purposes.

Defendants argue that the cases relied upon by plaintiffs and this court are inapplicable. First, they contend that plaintiffs' claim is a "pre-enforcement challenge to a statute as applied" as opposed to a pre-enforcement facial challenge to the statute. An "as applied" pre-enforcement challenge is one in which there has been no enforcement of the statute against the plaintiff, yet the plaintiff believes the application of the statute to him or her, as it has been interpreted by an agency or court, will be unconstitutional. Defendants contend this is different from a pre-enforcement "facial" challenge where the statute is being challenged on its-face. A pre-enforcement facial challenge is one where there has been no enforcement of the statute, and the statute has not yet been interpreted by an administrative agency nor has there been a judicial disposition regarding it. Instead, the plaintiff simply challenges the constitutionality of the statute based on the statute's language.

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[19] It is irrelevant to the issue of plaintiffs' standing that there are no identified tenants in this case. The harm or injury this court must focus on is the harm to the Bakers and Thomas, not a third party. Defendants have misconstrued who must suffer harm. In this case, the threat of prosecution of the anti-discrimination statutes against plaintiffs is sufficient harm to be an injury in fact for justiciability purposes. *See American-Arab I*, 940 F.2d 445.

In *American Booksellers*, plaintiffs' primary case law authority, the booksellers' association made a pre-enforcement facial challenge; thus, defendants in this case argue, *American Booksellers* is inapposite to this case. Defendants argue that "a pre-enforcement challenge to an enactment as applied . . . calls for a more specific factual record than does a pre-enforcement facial challenge.[20] Defendants rely on *Adult Video Ass'n v. United States Dep't of Justice*, 853 F. Supp. 263, 266 (W.D. Tenn. 1994), for this proposition.

In *Adult Video v. Dep't of Justice*, the court distinguished facial challenges from anticipated application challenges. The court was unconvinced that plaintiffs had standing where there was "a pre-enforcement challenge to the anticipated application of a statute--at some unknown future time--in the absence of specific facts indicating that a dispute exists between the parties." *Id.* Defendants here fail to recognize a significant difference between the case of *Adult Video v. Dep't of Justice* and the facts of this case. In *Adult Video v. Dep't of Justice*, the plaintiffs had not yet engaged in any activity which was illegal in the district, nor was plaintiffs' desired conduct certain to be criminal. The court found that "the plaintiffs have alleged no specific facts which give the court any reason whatsoever to believe that the plaintiffs will be prosecuted if they distribute the videotape" at issue in that case. *Id.* at 265-66. In this case, the Bakers and Thomas have each testified that they will refuse to rent to an unmarried couple. Such conduct has been deemed unlawful in this district by the Alaska Supreme Court, and persons engaged in such conduct have been prosecuted in the past. *See Foreman*, 779 P.2d 1199, and *Swanner*, 874 P.2d 274. Thus, in this case there is reason to believe that plaintiffs will be prosecuted for their conduct.

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[20] Clerk's Docket No. 25 at 6.

In addition, the Supreme Court in *American Booksellers* considered the pre-enforcement nature of that case and was "not troubled" by it because "[t]he State has not suggested that the . . . law will not be enforced, and we see no reason to assume otherwise." *American Booksellers*, 484 U.S. at 393. In this case, the statutes mandate enforcement, thus this court is not bothered by the pre-enforcement nature of the case either.

Regardless of whether this is a facial challenge or an "as applied" challenge, standing is proper because plaintiffs have alleged an injury in fact, which was caused by the statute and can be remedied by a favorable decision from this court.

Defendants also attempt to argue that the threat of prosecution concerning plaintiffs is not imminent because plaintiffs have not yet violated the statutes, there are no current complaints against plaintiffs, and there is no pending investigation into plaintiffs' activities. The defendants in *American-Arab* attempted to make the same argument. They failed. The circuit court was not concerned that the plaintiffs were not currently charged with violating the statute, nor was the court convinced that "there was no imminent likelihood that [the plaintiffs] will again be charged under the challenged provisions." *American-Arab I*, 940 F.2d at 449. The court was more concerned that the statute was regulatory and proscriptive in nature and that the penalty for noncompliance was high. The same is true in this case. The anti-discrimination statutes are regulatory and proscriptive. The statutory scheme mandates the search for and eradication of discrimination in housing. *See Union Local 879*, 551 P.2d at 945. In addition, the penalty for noncompliance includes a possible jail sentence of not more than 30 days or the possibility of seizure of one's property. Like defendants' argument that the threat of harm was not imminent in *American-Arab I*, defendants' argument here fails as well.

B. Ripeness

Unlike the standing to sue doctrine, the ripeness of an issue focuses on the timing of a claim. An issue is ripe for the federal court to make a disposition when "there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Lake Carriers' Ass'n v. MacMullan*, 406 U.S. 498, 506 (1972), *quoting Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941).

> [The] basic rationale [of the ripeness doctrine] is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.

Abbott Laboratories v. Gardner, 387 U.S. 136, 148-49 (1967).

Defendants argue that plaintiffs' claims are not ripe. They contend that this court will be "short circuit[ing] the ordinary process a case would go through under the challenged statute" if plaintiffs are granted the relief they request.[21] The prescribed procedure for a discrimination case to follow is outlined in the statute. See AMC 5.30.020 and AS 18.80.100, *et seq.* First, a complaint must be filed. AMC 5.30.010, AS 18.80.100. The appropriate party (*e.g.*, executive director, member of the ASCHR's staff or the AERC) then makes an impartial investigation into the alleged discrimination. AMC 5.30.020, AS 18.80.110. If any is found, an attempt is made to eliminate the discriminatory act or practice by conference, persuasion,

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[21] Clerk's Docket No. 25 at 5.

and conciliation. AMC 5.30.020, AS 18.80.110. If such efforts are unsuccessful, the ASCHR or AERC holds a public hearing. AMC 5.30.030, AS 18.80.120. If the appropriate commission finds that the person charged in the complaint engaged in discriminatory conduct or practice, the appropriate authority orders such person to cease such acts. AMC 5.30.050, AS 18.80.130. This order is subject to judicial review and enforceable by court order by the appropriate superior court. AMC 5.30.080., AS 18.80.135. Defendants assert that such procedural safeguards are sufficient for the vindication of plaintiffs claims.

As much as it may be true that the Alaska and Anchorage anti-discrimination statutes provide for significant procedural guidelines, the Ninth Circuit has held that when "a reasonable threat of prosecution exists, for purposes of standing, [the threat] effectively dispenses with any ripeness problem." *Barr*, 960 F.2d at 786. In this case, plaintiffs have shown a reasonable threat of prosecution for purposes of standing. *Supra* at 12. Thus, following precedent, this court concludes that plaintiffs' claims are ripe.

Eleventh Amendment Bar to Suit against State

The Eleventh Amendment of the United States Constitution bars suits "commenced or prosecuted against one of the United States by Citizens of another State . . . ." U.S. Const. Amend. XI. This language has been interpreted to bar actions against a state in federal court, absent a waiver. *Papasan v. Allain*, 478 U.S. 265, 276 (1986). The Eleventh Amendment does not bar suits against state officials in their official capacity unless the action is in earnest against the state. The general rule is that a state is the real party in the interest where the relief sought would expend itself on the public treasury, interfere with public administration, restrain the government from acting, or compel it to act. *Pennhurst State*

School and Hospital v. Halderman, 465 U.S. 89, 101 n.11 (1984) (*citing Dugan v. Rank*, 372 U.S. 609, 620 (1963)).

An exception to the Eleventh Amendment bar exists where a party seeks to enjoin a state official charged with the duty of enforcing an unconstitutional act. *Ex parte Young*, 209 U.S. 123, 155-56 (1908). The rationale behind the exception is that "such a suit would not be one against the State since the federal-law allegation would strip the state officer of his official authority." *Pennhurst*, 465 U.S. at 103. This exception requires "a connection between the official sued and enforcement of the allegedly unconstitutional statute, and there must be a threat of enforcement." *Long v. Van de Kamp*, 961 F.2d 151, 152 (9th Cir. 1992). The *Ex parte Young* exception applies only to relief that governs the official's future conduct, but not to awards of retroactive monetary relief. *See Edelman v. Jordan*, 415 U.S. 651 (1974).

As noted above, plaintiffs seek declaratory and injunctive relief. Such relief does not expend itself on the public treasury. Plaintiffs are not seeking any form of monetary award. In fact, the relief sought lessens the burden on the public treasury by allowing the executive director to focus her investigatory and prosecutorial duties elsewhere. At first blush, plaintiffs' relief appears to "interfere with the public administration . . . restrain the Government from acting, or to compel it to act." *Pennhurst*, 465 U.S. at 101, n.11. This is where the *Ex parte Young* exception applies. Plaintiffs are attempting to enjoin the enforcement of a statute alleged to be unconstitutional. Such actions are not against the state, but rather are against the official charged with the duty to enforce the alleged unconstitutional law.

By statute and regulation, the executive director of the ASCHR has the authority to investigate and prosecute complaints against landlords for marital status discrimination.

AS 18.80.100, 6 AAC § 30.220(b), 6 AAC § 30.330. The executive director and her staff are responsible for "investigating complaints of marital status discrimination, determining whether such complaints are supported by substantial evidence, attempting conciliation of the complaints, if conciliation is not obtained, amending the complaint if necessary, and prosecuting the complaints against landlords through hearing and appeal. *See* AS 18.80.100; [AS 18.80.110;] AS 18.80.120."[22] In addition, the executive director may act on her own in forming a complaint against an alleged discriminating landlord. AS 18.80.100.

The Alaska Administrative Code reinforces Haley's duty to enforce AS 18.80. "The executive director may file a complaint on behalf of an individual or a class of persons when acts or practices allegedly contrary to AS 18.80 come to his or her attention." 6 AAC § 30.220(a). The commission's staff conducts an impartial investigation of the complaint and any matters that are like, related to or growing out of the complaint. *See* 6 AAC § 30.320. They are also given the duty to determine whether the complaint is supported by substantial evidence and provide the parties with proposed terms of conciliation. *See* 6 AAC §§ 30.330 & 30.340. The executive director, if she determines that conciliation has failed, certifies the complaint to the chairperson of the commission. 6 AAC § 30.410. Once a hearing commences, the executive director is charged with the burden of proving the allegations of the complaint regardless of whether the complaint was initiated by an individual or the executive director. 6 AAC § 30.440.

It is clear that Haley has a duty to prosecute complaints of alleged discriminatory conduct. She also has the duty to investigate complaints and file complaints when she learns of

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[22] Clerk's Docket No. 37 at 18.

discriminatory conduct. This is what it means to enforce a statute. Defendant Haley would like this court to construe the term "enforcement" very narrowly. It is Haley's contention that enforcement includes only the holding of a hearing to determine whether discrimination has occurred and issuing an order requiring abandonment of such discrimination. These duties are clearly the responsibility of the commission. *See* AS 18.80.120 & - .130.

However, a person charged with the duty of prosecuting an alleged violator of a statute is also a part of the enforcement of that statute. The executive director is the person with such responsibility. Thus, both Haley and the commission are connected to the enforcement of AS 18.80. The *Ex parte Young* exception does not require the enforcing entity or person to be the only one with that responsibility. The exception applies to any state official with a sufficient connection to the enforcement of the alleged unconstitutional statute.

Because Haley has the responsibility of filing, investigating, and prosecuting complaints of alleged discrimination, Haley is sufficiently connected to the enforcement of AS 18.80.240. Plaintiffs also suffer from a threat of enforcement which is real and imminent. *Supra* at 11. Haley satisfied the requirements of the *Ex parte Young* exception to the Eleventh Amendment as announced by the Ninth Circuit in *Van de Kamp*, 961 F.2d at 152. Her participation as defendant is justified. Haley's cross-motion for summary judgment is denied.

CONCLUSION

Article III of the Constitution limits the power of the federal courts to make decisions regarding actual cases or controversies. This is known as the justiciability of a case. Included in this rubric are the notions of standing and ripeness.

Plaintiffs allege they suffer from fear of prosecution under the Alaska and Anchorage anti-discrimination statutes for refusing to rent to unmarried couples. In the face of a real and imminent threat of enforcement of the statutes by defendants, plaintiffs allege an injury in fact. In addition, their injury has a causal connection to the anticipated and mandated conduct of the defendants, and the relief which plaintiffs seek will redress their injury. As such, plaintiffs have standing to sue in this court.

Further, plaintiffs' claims are ripe for adjudication. The threat of prosecution sufficient to establish an injury in fact is also sufficient for the ripeness doctrine. In addition, there need not be any concern that the court will be entangling itself in administrative policies or decisions. The Alaska Supreme Court has already interpreted the statutes at issue in this case. Thus this court will only be considering the constitutionality of the statute as it relates to the First Amendment and the Religious Freedom Restoration Act. Because plaintiffs have standing to sue and their claims are ripe for judicial resolution, this case will not be dismissed for want of justiciability.

In addition, the Eleventh Amendment does not bar this action against ASCHR's executive director, Paula Haley. Haley is sufficiently connected to the enforcement of Alaska's anti-discrimination statute, and the threat of enforcement is real.

Plaintiffs' motion for summary judgment, regarding the issue of justiciability only, is granted. Defendants' cross-motions concerning justiciability are denied. Defendant Haley's cross-motion for summary judgment seeking dismissal based on the Eleventh Amendment is similarly denied.

DATED at Anchorage, Alaska, this 20 day of September, 1996.

/s/ H. Russell Holland
H. Russel Holland, Judge
District of Alaska

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

No. A95-0274-CV (HRH)
[Consolidated with No. A95-0275-CV (HRH)]

KEVIN THOMAS, et al.,

Plaintiffs,

vs.

ANCHORAGE EQUAL RIGHTS COMMISSION, et al.,

Defendants.

GARY and JOYCE BAKER,

Plaintiffs,

vs.

ANCHORAGE EQUAL RIGHTS COMMISSION, et al.,

Defendants.

FILED JAN 27 1997

ORDER

Motions for Summary Judgment

PROCEDURAL HISTORY

Plaintiffs Kevin Thomas and Gary and Joyce Baker move for summary judgment.[1] Defendants Anchorage Equal Rights Commission ("AERC"), Municipality of Anchorage, and Paula

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[1] Clerk's Docket No. 18A.

Haley also move for summary judgment.[2] All motions are opposed. Oral argument was requested[3] and heard.

FACTS

Plaintiffs own multiple residential rental properties in Anchorage, Alaska. They rent to people without regard to race, religion, gender, or marital status. However, based solely on their Christian beliefs, plaintiffs will not rent apartments to unmarried couples. Thomas has in the past refused to rent to an unmarried couple, and all plaintiffs assert that they will not rent to unmarried couples in the future.

Both the State of Alaska and the Municipality of Anchorage have anti-discrimination in housing statutes which prohibit landlords from discriminating against tenants based on marital status. Currently, there is no pending complaint against plaintiffs, nor is the AERC or the Alaska State Commission on Human Rights ("ASCHR") conducting any investigation into plaintiffs' activities.

Plaintiffs are devout Christians whose religious beliefs are founded upon the Bible. Thomas has attended and served the Christian church working with children for a number of years. The Bakers have been members of the Christian church for more than 15 years. Gary Baker, in particular, has served as an elder, part-time pastor, and lay pastor for the church in Tanana, Alaska.

Plaintiffs believe that it is a sin for a man and woman to live together prior to marriage. They believe "cohabitation . . . constitutes the sin of fornication and is grievously offensive to God."[4] They also believe that if they were to assist or facilitate

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[2] Clerk's Docket No. 25 & 26.

[3] Clerk's Docket No. 38.

[4] Clerk's Docket No. 18A at 5; Clerk's Docket No. 37 at 6.

someone else's cohabitation, they would be committing a sin themselves, and would therefore be "hypocrite[s] in the eyes of their [his] fellow Christians . . . ."[5] Plaintiffs' beliefs are "rooted . . . within Christianity . . . extend[ing] back to the Old Testament,[6] and include[] the New Testament,[7] the teachings of the Lord Jesus Christ,[8] the teachings of the Apostle Paul,[9] the teaching[s] of the Apostle Peter,[10] and the theology of the Reformation leader John Calvin."[11][12]

Plaintiffs believe their Christian beliefs should "be lived out in every aspect" of their lives, including commercial activities.[13] Thus, they fear, based on past enforcement of the applicable anti-marital status discrimination laws, that their refusal to rent to unmarried couples pursuant to their religious convictions may result in actions against them by defendants.

DISCUSSION

Plaintiffs seek prospective declaratory and injunctive relief against defendants pursuant to 42 U.S.C. § 1983; 42 U.S.C. §

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[5] Clerk's Docket No. 18A at 5; Clerk's Docket No. 37 at 6.

[6] *Exodus* 22:16; *Leviticus* 19:20; *Deuteronomy* 22:13-21, 23:17; *Proverbs* 2:16, 5:3-6, 6:24-29, 7, 29:3; *Ecclesiastes* 7:26; *Hosea* 4:11.

[7] *Acts* 15:19-20; *Jude* 7; *Revelation* 2:14, 21:18, 22:15.

[8] *Matthew* 15:16-20; *Mark* 7:18-23.

[9] *Romans* 1:29; *I Corinthians* 5:9-11, 6:9; *II Corinthians* 12:21; *Galatians* 5:19-21; *Ephesians* 5:5; *Colossians* 3:5-6; *I Thessalonians* 4:3; *I Timothy* 1:8-11; *Hebrews* 13:4.

[10] *I Peter* 4:1-6.

[11] John Calvin, *Calvin's Commentaries: The Epistle of Paul to the Romans and to the Thessalonians* (Ross Mackenzie trans.).

[12] Clerk's Docket No. 18A at 5-6; Clerk's Docket No. 37 at 6-7.

[13] Clerk's Docket No. 18A at 6; Clerk's Docket No. 37 at 7.

2000bb-1(c); and 28 U.S.C. §§ 2201 and 2202. They "seek to prohibit the defendants from acting to enforce Alaska and Anchorage anti-marital status discrimination laws, AS 18.80.240[14] and AMC 5.20.020,[15] against them or similarly

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[14] *Sec. 18.80.240. Unlawful practices in the sale or rental of real property.* It is unlawful for the owner, lessee, manager, or other person having the right to . . . rent real property

(1) to refuse to . . . rent the real property to a person because of sex, marital status, changes in marital status, pregnancy, race, religion, physical or mental disability, color, or national origin; however, nothing in this paragraph prohibits the sale, lease, or rental of classes of real property commonly known as housing for "singles" or "married couples" only;

(2) to discriminate against a person because of . . . marital status . . . in a term, condition, or privilege relating to the . . . rental of real property . . . .

(3) to make a written or oral inquiry or record of the . . . marital status . . . of a person seeking to . . . rent real property. . . .

. . . .

(5) to represent to a person that real property is not available for . . . rental . . . when in fact it is so available . . . because of the . . . marital status . . . of that person or of any person associated with that person. . . .

. . . .

(7) to make, print, or publish, or cause to be made, printed, or published, any notice, statement, or advertisement with respect to the sale or rental of real property that indicates any preference, limitation, or discrimination based on race, color, religion, physical or mental disability, sex, or national origin, or an intention to make the preference, limitation, or discrimination.

[15] *[AMC] 5.20.020 Unlawful practices in the sale or rental of real property.*

Except in the individual home wherein the renter or lessee would share common living areas with the owner, lessor, manager, agent, or other person, it is unlawful for the owner, lessor, manager, agent or other person having the right to sell, lease, rent or advertise real property:

A. To refuse to . . . rent the real property to a person because of . . . marital status . . . .

situated landlords so as to mandate the rental of residential property to unmarried cohabitors in disregard of sincere religious convictions."[16] The statutes prohibit discrimination in the sale or rental of housing based on marital status and prohibit written or oral inquiries into the marital status of prospective tenants. The Anchorage Municipal Code even prohibits the circulation or making of notices that indicate a *preference* based on marital status. Plaintiffs complain that the Free Exercise Clause of the First Amendment and the Religious Freedom Restoration Act of 1993 ("RFRA") exempt them from the anti-discrimination statutes.

First Amendment

The Free Exercise Clause of the First Amendment, which is applicable to the states through the Fourteenth Amendment, provides that "Congress shall make no law respecting an

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B. To discriminate against a person because of . . . marital status . . . in a term, condition or privilege relating to the use, sale, lease or rental of real property;

C. To make a written or oral inquiry or record of the . . . marital status . . . of a person seeking to . . . rent real property;

D. To offer, solicit, accept, use or retain a listing of real property with the understanding that a person may be discriminated against in a real estate transaction or in the furnishing of facilities or sources in connection therewith because of a person's . . . marital status . . .

E. To represent to a person that real property is not available for . . . rental . . . when in fact it is available, or to refuse a person the right to inspect real property, because of the . . . marital status . . . of that person or because of any person associated with that person . . . .

. . . .

G. To circulate, issue or display, make, print or publish, or cause to be made or displayed, printed or published, any communication, sign, notice, statement or advertisement, with respect to the use, sale, lease or rental of real property that indicates any preference, limitation, specification or discrimination based on . . . marital status . . . .

[16] Clerk's Docket No. 37 at 2.

establishment of religion, or prohibiting the free exercise thereof. . . ." U.S. Const. amend. I. "The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires." *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 877 (1990). "'[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.'" *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993) (*quoting Thomas v. Review Board of Indiana Employment Sec. Div.*, 450 U.S. 707, 714 (1981). The Free Exercise Clause also protects certain religious conduct if the conduct is banned only because it is "engaged in for religious reasons, or only because of the religious belief that [it] display[s]." *Smith*, 494 U.S. at 877. On the other hand, the First Amendment does not prohibit valid and neutral laws of general applicability although they may have the effect of proscribing (or prescribing) conduct that a person's religion prescribes (or proscribes). *See Id.* at 879.[17]

A law is not neutral if the object of the law is to infringe upon or restrict religious practices.

> [T]he minimum requirement of neutrality is that a law not discriminate on its face. A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from the language or context.

Hialeah, 508 U.S. at 533. The Free Exercise Clause also "forbids subtle departures from neutrality." *Gillette v. United States*, 401 U.S. 437, 452 (1971).

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[17] The First Amendment no longer requires that a law which has an incidental effect of burdening a particular religious practice be justified by a compelling governmental interest. *See Smith*, 494 U.S. 872. However, a law failing to satisfy [the neutrality and general applicability] requirements must still be justified by a compelling governmental interest and must be narrowly tailored to advance that interest. *Hialeah*, 508 U.S. at 533.

> Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. The Free Exercise Clause protects against governmental hospitality which is masked as well as overt.

Hialeah, 508 U.S. at 534.

A law must also be of general applicability to be consistent with the protections of the First Amendment. *Smith*, 494 U.S. at 879-881. The government cannot selectively impose burdens on conduct motivated by religious belief. An essential purpose of the Free Exercise Clause is to protect religious observers against unequal treatment. Thus, when a legislature attempts to advance governmental interests that it feels are worthy of being pursued only against conduct with a religious motivation, the regulation is constitutionally prohibited.

In this case, plaintiffs take issue with the anti-discrimination statutes of Alaska and Anchorage. The language of the statutes does not single out any religious group or practice. In addition, it is plain in the language of the statutes that the purpose is to prohibit and eliminate discrimination in

rental properties and the housing market.[18] There is no dispute that the statutes are neutral.

Similarly, Alaska Statute 18.80.240 and AMC 5.20.020 apply equally to all people in the business of selling and renting real property. The statutes do not specify or imply application to any particular religious group or person. The statutes are generally applicable. Therefore, both statutes satisfy the requirements of *Smith*.

A First Amendment analysis does not end here as defendants argue it should. Under certain circumstances, the Supreme Court has indicated that the pre-*Smith*, compelling governmental interest test should be applied for purposes of First Amendment free exercise analysis even after *Smith*.[19] *See*

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[18] The purpose of AS 18.80.240 is stated in AS 18.80.200 and provides:

> (a) It is determined and declared as a matter of legislative finding that discrimination against an inhabitant of the state because of race, religion, color, national origin, age, sex, physical or mental disability, marital status, changes in marital status, pregnancy, or parenthood is a matter of public concern and that this discrimination not only threatens the rights and privileges of the inhabitants of the state but also menaces the institutions of the state and threatens peace, order, health, safety, and general welfare of the state and its inhabitants.
>
> (b) Therefore, it is the policy of the state and the purpose of this changer to eliminate and prevent discrimination in employment, in credit and financing practices, in places of public accommodation, in the sale, lease, or rental of real property because of race, religion, color, national origin, sex, age, physical or mental disability, marital status, changes in marital status, pregnancy or parenthood.

[19] Prior to *Smith*, courts balanced the rights of individuals against the state's interest in adopting the particular infringing statute. The court weighed the burden of the law with the state's compelling interest and required that the law be narrowly tailored to satisfy that interest.

Smith, 494 U.S. at 881. *Smith* has been interpreted by some courts as holding that when a hybrid of constitutionally protected rights are involved, the state must show a compelling governmental interest for regulating the plaintiff's conduct and the law in question must be narrowly tailored to serve that interest. The Court observed with approval that:

> The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press.

Id., 494 U.S. at 881. The Supreme Court of Alaska has itself recognized the foregoing hybrid concept and put *Swanner v. Anchorage Equal Rights Commission*, 874 P.2d 274, 280 (Alaska 1994), outside of the hybrid case.

In this case, plaintiffs contend that enforcement of AS 18.80.240 and AMC 5.20.020 infringes upon their freedom of speech rights and their right to exclude others from their property. The statutes forbid them from making oral or written inquiries of potential tenants' marital status and forbid them from telling potential tenants that their property is not available for inspection or rental to unmarried cohabitors. Additionally, the municipal statute forbids them from making, printing, or publishing any advertisement regarding their rental property stating their religious beliefs against rental to unmarried cohabitors.[20] Under the Municipal Code, plaintiffs cannot even state their marital status preferences. There is also evidence that past remedial action against violators of the statutes has

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[20] Curiously, the state statute omits marital status from a similar provision. AS 18.80.240(7).

included the publishing of notices to tenants and potential tenants stating the illegality of the violators' religiously motivated rental practices. Defendants respond by disingenuously arguing that plaintiffs could avoid freedom of speech implications by not asking about a potential tenant's marital status, advertising solely at their church, or hiring a rental agent so they would not know or be tempted to ask about a tenant's marital status. To the court's dismay, defendants' suggestions would have plaintiffs' violate the spirit of the law.

It is from these anti-discrimination statutes that free exercise and city and state law collide. These prohibitions in AS 18.80.240 and AMC 5.20.020 impact plaintiffs' freedom of speech and bring this case within the purview of those hybrid cases acknowledged by the Supreme Court in *Smith*. Plaintiffs assert a colorable claim under the First Amendment and the compelling interest test should be applied.[21]

Even if this case were not one involving hybrid constitutional rights, the compelling interest test would still apply because plaintiffs have made a claim under RFRA. The compelling interest test is the same under both a hybrid rights analysis and a RFRA analysis. The court will discuss the test below.

Religious Freedom Restoration Act

Congress adopted the Religious Freedom Restoration Act of 1993 as a federal statutory response to the Supreme Court's 1990 decision in *Smith* which abandoned the compelling

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[21] Plaintiffs do not contend that they could "carry the day" with these First Amendment arguments, nor does the *Smith* decision imply any such requirement. Plaintiffs simply assert that their free speech rights are implicated in this case along with their free exercise rights, and therefore the compelling interest test should be used. The court agrees.

interest test in certain situations.[22] RFRA declares that "laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise." 42 U.S.C. § 2000bb(a)(2). RFRA "applies to all Federal and State law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993." 42 U.S.C. § 2000bb-3(a). Plaintiffs claim AS 18.80.240 and AMC 5.20.020 infringe upon their religious exercise in denying potential tenants accommodation.

Under RFRA, "person[s] whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government." 42 U.S.C. § 2000bb-1(c). The Act provides:

> Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except [where the] application of the burden to the person –
>
> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000bb-1.

Defendants argue that plaintiffs' refusal to rent property to unmarried tenants does not invoke the Free Exercise Clause. Were such the case, RFRA would not apply to this case. Defendants assert that the renting of an apartment does not

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[22] The purpose of RFRA is "to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), and to guarantee its application in all cases where free exercise of religion is substantially burdened." 42 U.S.C. § 2000bb(b)(1).

constitute the type of activity or religious conduct that is protected by the First Amendment, and therefore RFRA does not apply. The court concludes otherwise.

In *Smith v. Fair Employment & Housing Commission* ("*Smith v. FEHC*"), 913 P.2d 909 (Cal. 1996), the California Supreme Court decided a case on remarkably similar facts to those which face this court. In that case, the would-be tenants made a similar argument to that which defendants offer here. The court, however, concluded that the claim could not be summarily dismissed.

> The religious practice [the] FEHA is alleged to burden is not the renting of apartments, but [landlord's] practice of not committing the sin she believes inheres in renting to unmarried cohabitants. That the alleged burden is indirect is irrelevant; the same is true of virtually all of the cases decided under the accommodation doctrine that RFRA codified. While the renting of apartments may not constitute the exercise of religion, if [the landlord] claims the laws regulating that activity indirectly coerce her to violate her religious beliefs, we cannot avoid testing her claim under the analysis codified in RFRA.

Id. at 923 (citation omitted). Claims that would otherwise have been colorable First Amendment claims prior to *Smith* are colorable claims under RFRA. *See U.S. v. DeWitt*, 95 F.3d. 1374, 1375 (8th Cir. 1996) (The term "exercise of religion" means the exercise of religion under the First Amendment.). RFRA is applicable to this case.

Compelling Governmental Interest Test

The compelling governmental interest test is applicable to this case under both the First Amendment and RFRA. The compelling governmental interest test requires a review of the

Free Exercise Clause cases that pre-dated *Smith* and the application of that test in those cases. 42 U.S.C.§ 2000bb(a)(5); *see Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

First, the alleged burden must fall on a religious belief as opposed to a philosophy or way of life. *Yoder*, 406 U.S. at 215-219. The burdened religious belief must also be sincerely held. *Thomas*, 450 U.S. at 716.[23] Next, the religious adherent has the burden of proving the existence of a substantial interference with the right of free exercise. "After this threshold showing has been made, the burden then shifts to the government to demonstrate that the challenged regulation furthers a compelling state interest in the least restrictive manner." *Werner v. McCotter*, 49 F.3d 1476, 1480 n.2 (10th Cir. 1995).

Substantial Burden. Substantial burden is not defined in RFRA nor do the Free Exercise Clause cases decided before *Smith* offer a generally applicable definition or generally applicable test for determining whether a substantial burden exists. The court must determine whether there is a substantial burden by analogy to existing Free Exercise case law.

RFRA specifically refers to *Sherbert*, 374 U.S. 398 and *Yoder*, 406 U.S. 205, as illustrations of the compelling interest test that should be restored under the Act. In *Sherbert*, the claimant refused to work on the Sabbath as dictated by his religion. He quit his job and filed for unemployment compensation. His application was denied. The Court found in favor of the claimant because his free exercise was substantially burdened. The Court has consistently held in favor of the claimant in a line of unemployment compensation cases affecting the free exercise clause. *See Frazee v. Illinois Dept.*

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[23] It is undisputed that plaintiffs' beliefs are religious, and it is undisputed that those beliefs are sincerely held. However, defendants dispute that the conduct at issue is related to plaintiffs' religious beliefs.

of Employment Security, 489 U.S. 829 (1989); *Hobbie v. Unemployment Appeals Comm'n of Florida*, 480 U.S. 136 (1987); *Thomas*, 450 U.S. 707. The rule taken from these cases states that:

> "Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, *or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs,* a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial."

Hobbie, 480 U.S. at 141 (*quoting Thomas*, 450 U.S. at 717-18).

In *Yoder*, 406 U.S. 205, the Supreme Court held in favor of the claimant who was of the Amish faith. The claimant challenged a Wisconsin statute which required students to attend school through the age of 16. The Amish religion requires children to be educated at home after the eighth grade so that worldly influences are not pressed upon them and allows for parents to teach their children during their formative teenage years how to integrate into the Amish community. The Court held that the state statute substantially burdened the claimant's Amish beliefs because it was wholly incompatible with the Amish religion. The Court also noted that because adolescence comes but once in a lifetime, there would be permanent harm if Amish children were required to attend public high school.

Other factors the Court has considered is whether the burden is merely economic or whether the accommodation would impact the rights of third parties. In *Braunfeld v. Brown*, 366 U.S. 599 (1961), Orthodox Jewish shopkeepers who observed Saturday as the Sabbath pursuant to their faith,

challenged a law requiring shops be closed on Sunday. They argued that they could only be open for business five days a week which put them at an economic disadvantage based on their religious belief. The Court found no substantial burden existed because the law "does not make unlawful any religious practices of [the shopkeepers]; the Sunday law simply regulates a secular activity and, as applied to appellants, operates so as to make the practice of their religious beliefs more expensive." *Id.* at 605.

> [The shopkeepers were] not faced with as serious a choice as forsaking their religious practices or subjecting themselves to criminal prosecution. Fully recognizing that the alternatives open to [the shopkeepers] and others similarly situated–retaining their present occupations and incurring economic disadvantage or engaging in some other commercial activity which does not call for either Saturday or Sunday labor–may well result in some financial sacrifice in order to observe their religious beliefs, still the option is wholly different than when the legislation attempts to make a religious practice itself unlawful.

Id. at 605-606.

In a RFRA case, *Goodall v. Stafford County School Board*, 60 F.3d 168 (4th Cir. 1995), the claimants sent their child to a private school. The state refused to pay for a cued speech interpreter unless the child remained in public school. The court in that case found that the economic burden placed on the claimants "to provide [their son] with a cued speech interpreter at [a] private sectarian school does not constitute a substantial burden under RFRA." *Id.* at 173. The court reiterated that:

> It is well established that there is no substantial burden placed on an individual's free exercise of

> religion where a law or policy merely "operates so as to make the practice of [the individual's] religious beliefs more expensive."

Id. at 171 (*quoting Braunfeld*, 366 U.S. at 605).

In *United States v. Lee*, 455 U.S. 252, 254 (1982), the Court was put to the question of "whether imposition of social security taxes is unconstitutional as applied to persons who object on religious grounds to receipt of public insurance benefits and to payment of taxes to support public insurance funds." The Court held that a self-employed Amish person was exempt, but an Amish employer must contribute. The Court noted that:

> Congress and the courts have been sensitive to the needs flowing from the Free Exercise Clause, but every person cannot be shielded from all the burdens incident to exercising every aspect of the right to practice religious beliefs. When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity.

Id. at 261.

In this case, plaintiffs contend their religious convictions against cohabitation are substantially burdened by the city's and state's statutes AS 18.80.240 and AMC 5.20.020 which prohibit discrimination based on marital status. First, plaintiffs attempt to align this case with the employment compensation cases where the Court found a substantial burden on religious practice. *See Sherbert*, 374 U.S. 398; *Frazee*, 489 U.S. 829; *Hobbie*, 480 U.S. 136; *Thomas*, 450 U.S. 707. In those cases, the Court found a substantial interference with religious

exercise because the state was either conditioning receipt of a benefit or denying a benefit based on conduct mandated by religious belief. Plaintiffs do not allege that a benefit has been denied or conditioned in this case. The employment compensation cases are inapposite to this case.

Plaintiffs also argue that it is a substantial burden to be required to make a choice between remaining in the rental business or giving up their religious beliefs. They allege that forcing them to make a choice between their sincere religious convictions and complying with the law runs afoul of the Supreme Court's Free Exercise Clause cases. *See Braunfeld*, 366 U.S. at 605-606. Although no substantial burden was found in *Braunfeld*, the Court suggests that had the claimants been faced "with as serious a choice as foresaking their religious practices or subjecting themselves to criminal prosecution," the court would have found a substantial burden. *Id.* at 605. That is the situation facing the plaintiffs here.

In contrast, defendants assert that laws making it more difficult or costly to run a business because of individualized religious beliefs do not impose substantial burdens.[24] They argue that "'[i]t cannot be expected, much less required, that legislators enact no law regulating conduct that may in some way result in an economic disadvantage to some religious sects and not to others because of the special practices of the various religions.' *Braunfeld v. Brown*, 366 U.S. 599, 606 []."[25] Defendants argue that any burden on plaintiffs is purely economic. They contend that by entering the residential rental market, plaintiffs have entered into a commercial activity that is regulated by the state and municipality and have done so

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[24] Clerk's Docket No. 25 at 16-17.

[25] *Id.*

voluntarily. Based on *Braunfeld*, defendants assert that there is no substantial burden.

As noted above, this case is unlike the situation in *Braunfeld*. In that case, the religious practice of closing for business on Saturday was not unlawful but merely a self-imposed limitation which resulted in economic loss. In this case, the Anchorage and Alaska anti-discrimination statutes make plaintiffs' religious practice of denying unmarried couples housing unlawful. Thus, plaintiffs must make a choice of subjecting themselves to criminal prosecution or abandoning their religious beliefs. The absence of such a choice was a significant factor in *Braunfeld* where the Court held that there was no substantial interference. The burden here is more than merely economic; it directly forbids plaintiffs from conforming to their religious convictions. Similar to the situation in *Yoder*, the statutes are wholly incompatible with their religious beliefs.

Defendants argue that "followers of a particular sect [who] enter into commercial activity as a matter of choice" cannot impose "the limits they accept on their own conduct as a matter of conscience and faith [upon] the statutory schemes which are binding on others in that activity." *Lee*, 455 U.S. at 261. In *Lee*, the Amish employer was imposing his beliefs on his employees by not paying social security taxes. *Lee* is distinguishable because plaintiffs in this case are more similar to the self-employed Amish individuals who were exempt from paying social security taxes because their belief did not interfere with the rights of others engaged in that activity. Absent the statute and ordinance at issue here, unmarried, prospective tenants would have no right to object to plaintiffs' refusal to rent to them. The latter are not analogous to employees who are entitled to social security coverage.

Defendants would also have this court adopt the holding of a recent California case similar to this one, *Smith v. FEHC*, 913

P.2d 909. In that case an unmarried couple attempted to rent an apartment from Evelyn Smith. Upon learning the couple was unmarried, Smith returned their deposit and refused to rent to them based on her religious beliefs. "[Smith] believes that sex outside of marriage is sinful, and that it is a sin for her to rent her units to people who will engage in nonmarital sex on her property." *Id.* at 912.

Like the statutes in this case, the California Fair Employment and Housing Act (Cal. Gov't Code, § 12900, *et seq.* (West 1997)), prohibits discrimination in the renting of housing based on marital status. The landlords argued that their First Amendment rights were violated as well as their rights under RFRA and the California Constitution. The court in that case found that the First Amendment was not violated because the statute in question was neutral and generally applicable. That court applied the compelling interest test on the RFRA claim and failed to find that Smith's free exercise was substantially burdened. The court held that based on the body of Free Exercise Clause case law that:

> Smith's religion does not require her to rent apartments, nor is investment in rental units the only available income-producing use of her capital. Thus, she can avoid the burden on her religious exercise without violating her beliefs or threatening her livelihood. The asserted burden is the result not of a law directed against religious exercise, but of a religion-neutral law that happens to operate in a way that makes Smith's religious exercise more expensive. Finally, to grant the requested accommodation would not affect Smith alone, but would necessarily impair the rights and interests of third parties.

Id. at 928-929 (citations omitted).

This court rejects the substantial burden analysis offered by the California Supreme Court. First, the anti-discrimination laws do not make it more expensive for plaintiffs to operate their business, it puts plaintiffs out of business. Second, the third-party rights that the FEHC decision speaks of are not constitutionally protected rights. Moreover, the Alaska Constitution, Article I, Section 1, recognizes a right to the fruits of one's industry but does not recognize cohabitation as an unqualified right. The Federal Fair Housing cases also do not create any such right in third parties. This court cannot accept the argument that the right to cohabitation is more or equally valued as the plaintiffs' right to free exercise. Third, the fact that plaintiffs have chosen to enter into the business of renting property does not make it any less likely that their religious beliefs may be substantially burdened. Plaintiffs have a constitutional right to acquire and hold property.

Defendants argue that the Supreme Court has made specific note in its decisions that exemptions are granted only when no other person's rights were infringed by the accommodation.[26] With respect to the rights of third parties, defendants raise a "slippery slope" argument. They assert that allowing an exemption in this case would be the beginning of an exodus of persons/groups seeking exemptions from the anti-discrimination statutes based on individual religious beliefs, including racial discrimination, gender discrimination, national origin discrimination, etc. This argument has no legal merit whatsoever. Secular infringement upon religious practices, if

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[26] In *Yoder*, the Court repeatedly stated that granting the exemption to the claimant did not affect the rights of third parties, "and any reliance on that theory would find no support in the evidence." *Yoder*, 406 US. at 230; *see also Sherbert*, 374 U.S. at 409 ("Nor does the recognition of the appellant's right to unemployment benefits under the state statute serve to abridge any other person's religious liberties."); *Estate of Thornton v. Caldor, Inc.*, 58 (2d Cir. 1953); *Smith v. FEHC*, 913 P.2d at 928.

allowed, might also be characterized as a "slippery slope". Indeed, cohabiting was a crime in the Territory of Alaska (ACLA 65-9-3 (1949). The crime of cohabitation came into state law in 1959 as AS 11.40.040. That section was reenacted in 1964. SLA 1964, ch. 43, § 19. The crime of cohabiting was not repealed until 1978. SLA 1978, ch. 166, § 21. In 1975 (and despite the conflict with AS 11.40.040), the Alaska Legislature made it unlawful to refuse to rent on the basis of cohabitation and similarly proscribed even inquiring into the matter of marital status. SLA 1975, ch. 104, § 11. The rights and wrongs of marital status has been a rather slippery subject over the brief span of 25 years.

The court finds that plaintiffs' free exercise of religion has been substantially burdened.

Government's Compelling Interest. Because plaintiffs have shown that their right to free exercise has been substantially burdened, the burden shifts to the government to show that it has a compelling interest to justify that burden. RFRA does not define compelling governmental interest, and pre-*Smith* case law is not helpful. In the Free Exercise cases where the Court did find a substantial burden, the government never had a compelling interest to justify the burden. Accommodations were, therefore, permitted.

In the employment compensation cases, the governments' primary interest was to avoid widespread unemployment and to protect their unemployment funds. The Court found these interests to be "by no means unimportant," but not compelling. *Thomas*, 450 U.S. at 719. Similarly, the Court found the government's interest in *Yoder* not to be compelling. Wisconsin asserted that it had a compelling interest in ensuring all children in the state were educated at least until the age of 16. The Court denied the state's alleged compelling interest because it was too general and because

they could not justify an interest in educating children past the eighth grade. The state advanced two primary arguments in support of its system of compulsory education: (1) "that some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence" and (2) that "education prepares individuals to be self-reliant and self-sufficient participants in society." *Yoder*, 406 U.S. at 221. The court accepted these propositions but failed to see how two additional years of education would serve those interests. Therefore, the interests asserted were not compelling.

The Alaska Supreme Court answered the compelling interest question in *Swanner*, 874 P.2d at 280. In that case, three complainants filed separate complaints against Swanner for marital status discrimination in the rental of real property. Swanner refused to rent or show property to unmarried couples based on his Christian religious beliefs.[27] The court held that the government had two interests that were compelling: "a 'derivative' interest in ensuring access to housing for everyone, and a 'transactional' interest in preventing individual acts of discrimination based on irrelevant characteristics." *Id.* at 282.

In addition to setting forth the same interests as those in *Swanner*, defendants here argue that they have a compelling interest in protecting the freedom of intimate association. *See Roberts v. United States Jaycees*, 468 U.S. 609, 618-620 (1984)

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[27] Unlike federal law, Alaska law does not require a showing of a substantial burden on the exercise of religion. The claimant must only show: "(1) a religion is involved, (2) the conduct in question is religiously based, and (3) the claimant is sincere in his/her religious belief." *Swanner*, 874 P.2d at 281. Once the requirements are met, it is up to the government to either show that there is "'some substantial threat to public safety, peace or order'" or that "there are competing governmental interests 'of the highest order . . .'." *Id.* (*quoting Seward Chapel, Inc. v. City of Seward*, 655 P.2d 1293, 1301 n.33 (Alaska 1982)).

("The Court has long recognized that, because the Bill of Rights is designed to secure individual liberty, it must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State."); *see also Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

Plaintiffs dispute the government's alleged compelling interests. First, they argue that in both Minnesota and Massachusetts, the courts have held that the government had no compelling interest in burdening the claimants' exercise of religion on facts similar to those in this case. In *Attorney General v. Desilets*, 636 N.E.2d 233 (Mass. 1994), the court found that the government did not prove a compelling interest sufficient to warrant summary judgment. "[O]n the summary judgment record, we conclude that the uncontested material facts disclose no basis for ruling that the Commonwealth can or cannot meet its burden of establishing that it has a compelling interest that can be fulfilled only by denying the defendants an exemption from [the statute]." *Id.* at 241. Similarly, in *State by Cooper v. French*, 460 N.W.2d 2 (Minn. 1990), the court there held the government did not have a compelling interest to burden plaintiff's religious freedom.

This court is not bound by *Swanner* and does not find defendants' arguments particularly persuasive. Instead, the court is persuaded by Justice Moore's dissent in *Swanner*, 874 P.2d at 289, and Justice Thomas' dissent in the denied petition for writ of *certiorari* in the same case. *See Swanner v. Anchorage Equal Rights Comm'n, cert. denied*, ___ U.S. ___, 115 S. Ct. 460 (1994). As noted in those dissents, the state must show that there is a paramount interest in limiting the plaintiffs' free exercise of religion. In *Yoder*, the Court stated:

> The essence of all that has been said and written on the subject is that only those interests of the highest order . . . can over-balance legitimate claims to the free exercise of religion.

Yoder, 406 U.S. at 215.

The eradication of marital status discrimination is not of the *highest order*. Defendants attempt to align marital status with racial discrimination because the two are prohibited by the same statute. Past case law has shown that there is a national policy against racial discrimination. *See Bob Jones University v. United States*, 461 U.S. 574 (1983). As Justice Thomas pointed out in his dissent, "there is surely no 'firm national policy' against marital status discrimination in housing decisions." *Swanner*, ___ U.S. ___, 115 S. Ct. at 461. Moreover, there is no state policy against marital status discrimination.[28] The court does not deny that the eradication of discrimination is an important interest; however, the eradication of marital status discrimination does not rise to level of compelling. Indeed, what the State of Alaska and the Municipality of Anchorage promote through the marital status aspect of the laws here at issue is inconsistent with traditional family values and was itself still a criminal offense in 1975 when the state law was amended to add protection of cohabiting.

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[28] *See Swanner*, 874 P.2d at 289:

> Alaska law explicitly sanctions such discrimination. *See, e.g.*, AS 13.11.015 (intestate succession does not benefit unmarried partner of decedent); AS 23.30.215(a) (worker's compensation death benefits only for surviving spouse, child, parent, grandchild, or sibling); Alaska R. Evid. 505 (no marital communication privilege between unmarried couples); *Serradell v. Hartford Accident & Indemn. Co.*, 843 P.2d 639, 641 (Alaska 1992) (no insurance coverage for unmarried partner under family accident policy).

With regard to defendants' assertion that there is a compelling interest to protect intimate association, the court finds that such an interest is not compelling. Like marital status, intimate association has never been recognized as a constitutionally protected right. The court does not dispute that there is a right to privacy in the Constitution and its amendments. However, defendants' attempt to liken the right of intimate association with the right to privacy misses the crux of those cases in that the right to privacy is based on the premise that the persons whose rights are protected are *married*.[29] The defendants have not shown that there is a compelling governmental interest to burden plaintiffs' free exercise of religion.

Means Are Narrowly Tailored. Even if this court were to have found that there is a compelling governmental interest, the government must still show that the statute is narrowly tailored and the least restrictive alternative to overcome the substantial burden on free exercise. The laws are not narrowly drawn. They proscribe refusal to rent based on marital status and even go on to prohibit landlords from professing their beliefs in writing or orally. Plaintiffs cannot place advertisements or notices for rental units where only members of their church will see, as defendants argued, without being in violation of the statute. Moreover, plaintiff cannot even express a "preference" without

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[29] The Supreme Court of the United States has consistently recognized an implied right to privacy in the Constitution. *See Loving v. Virginia*, 388 U.S. 1 (1967). The right has been extended to: contraception, *Griswold v. Connecticut*, 381 U.S. 479 (1965); child rearing and education, *Meyer v. Nebraska*, 262 U.S. 390 (1923); family relationships, *Prince v. Massachusetts*, 321 U.S. 158 (1944); procreation, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); abortion, *Roe v Wade*, 410 U.S. 113 (1973), and reading and possessing obscene materials in one's home, *Stanley v. Georgia*, 394 U.S. 557 (1969). The Court drew the line on that same right to privacy when faced with a homosexual's alleged right to consensual sodomy, *Bowers v. Hardwick*, 478 U.S. 186 (1986).

being subject to criminal prosecution. The defendants' unprincipled argument that the plaintiffs should advertise and rent only to church members is patently inconsistent with the goal of eradicating discrimination; it is simply a denial that discrimination exists. With a wink and a nod, defendants would have plaintiffs compound the discrimination which the law now criminalizes with covert civil disobedience.

These statutes go too far and infringe plaintiffs' free exercise of religion and speech rights too much to be considered narrowly drawn.

CONCLUSION

The facts of this case are undisputed, therefore, it is ripe for summary judgment. Plaintiffs claims are colorable under the First Amendment by means of infringement on a hybrid of constitutionally protected rights and under RFRA. For purposes of both the First Amendment and RFRA, plaintiffs have shown that the anti-discrimination statutes at issue here substantially burden their right to free exercise. Defendants have made disingenuous arguments condoning plaintiffs' violations of the spirit of the laws, but have failed to show a compelling governmental interest for the burdens the statutes impose. In addition, defendants have not shown that the statutes are narrowly drawn to promote the alleged compelling interests. Plaintiffs' motions for summary judgment are granted. Defendants' cross-motions for summary judgment are denied.

The clerk of court shall enter declaratory judgment in favor of the consolidated plaintiffs and against the defendants, declaring that those portions of AS 18.80.240 and AMC 5.20.020 which proscribe plaintiffs' conduct as regards residential rentals to unmarried persons are unconstitutional as applied to the said plaintiffs. Defendants, their officers, agents, employees, and all others acting in concert with them, are

permanently enjoined from enforcing the marital status portions of AS 18.80.240 and AMC 5.20.020 as to the plaintiffs.

DATED at Anchorage, Alaska, this 25 day of January, 1997.

/s/ H. Russell Holland
H. Russel Holland, Judge
District of Alaska

APPENDIX F

STATUTORY PROVISIONS

AS 18.80.240

Unlawful practices in the sale or rental of real property. It is unlawful for the owner, lessee, manager, or other person having the right to sell, lease, or rent real property

(1) to refuse to sell, lease, or rent the real property to a person because of sex, marital status, changes in marital status, pregnancy, race, religion, physical or mental disability, color, or national origin; however, nothing in this paragraph prohibits the sale, lease, or rental of classes of real property commonly known as housing for "singles" or "married couples" only;

(2) to discriminate against a person because of sex, marital status, changes in marital status, pregnancy, race, religion, physical or mental disability, color, or national origin in a term, condition, or privilege relating to the use, sale, lease, or rental of real property; however, nothing in this paragraph prohibits the sale, lease, or rental of classes of real property commonly known as housing for "singles" or "married couples" only;

(3) to make a written or oral inquiry or record of the sex, marital status, changes in marital status, race, religion, physical or mental disability, color, or national origin of a person seeking to buy, lease, or rent real property;

(4) to offer, solicit, accept, use, or retain a listing of real property with the understanding that a person may be discriminated against in a real estate transaction or in the furnishing of facilities or sources in connection therewith because of a person's sex, marital status, changes in marital status, pregnancy, race, religion, physical or mental disability, color, national origin, or age;

(5) to represent to a person that real property is not available for inspection, sale, rental, or lease when in fact it is so available, or to refuse to allow a person to inspect real property because of the race religion, physical or mental disability, color, national origin, age, sex, marital status, change in marital status, or pregnancy of that person or of any person associated with that person;

(6) to engage in blockbusting;

(7) to make, print, or publish, or cause to be made, printed, or published, any notice, statement, or advertisement with respect to the sale or rental of real property that indicates any preference, limitation, or discrimination based on race, color, religion, physical or mental disability, sex, or national origin, or an intention to make the preference, limitation, or discrimination.

AS 18.80.270

Penalty. A person, employer, labor organization, or employment agency, who or that wilfully engages in an unlawful discriminatory conduct prohibited by this chapter, or wilfully resists, prevents, impedes, or interferes with the commission or any of its authorized representatives in the performance of duty under this chapter, or who or that wilfully violates an order of the commission, is guilty of a misdemeanor and upon conviction by a court of competent jurisdiction is punishable by a fine of not more than $500, or by imprisonment in a jail for not more than 30 days, or by both.

AMC 5.20.020

Unlawful practices in sale or rental of real property.

Except in the individual home wherein the renter or lessee would share common living areas with the owner, lessor, manager, agent or other person, it is unlawful for the owner,

lessor, manager, agent or other person having the right to sell, lease, rent or advertise real property to:

A. Refuse to sell, lease or rent the real property to a person because of race, religion, age, sex, color, national origin, marital status or physical or mental disability.

B. Discriminate against a person because of race, religion, age, sex, color, national origin, marital status or physical or mental disability in a term, condition or privilege relating to the use, sale, lease or rental of real property.

C. Make a written or oral inquiry or record of the race, religion, age, sex, color, national origin, marital status or physical or mental disability of a person seeking to buy, lease or rent real property.

D. Offer, solicit, accept, use or retain a listing of real property with the understanding that a person may be discriminated against in a real estate transaction or in the furnishing of facilities or sources in connection therewith because of a person's race, religion, age, sex, color, national origin, marital status or physical or mental disability.

E. Represent to a person that real property is not available for inspection, sale, rental or lease when in fact it is available, or refuse a person the right to inspect real property, because of the race, religion, age, sex, color, national origin, marital status or physical or mental disability of that person or because of any person associated with that person.

F. Engage in blockbusting.

G. Circulate, issue or display, make, print or publish, or cause to be made or displayed, printed or published, any communication, sign, notice, statement or advertisement with respect to the use, sale, lease or rental of real property that indicates any preference, limitation, specification or discrimination based on race, religion, age, sex, color, national origin, marital status or physical or mental disability. This shall not be construed to apply to publishing companies which accept advertising in the ordinary course of business.

APPENDIX G

BEFORE THE ALASKA STATE COMMISSION
FOR HUMAN RIGHTS

ASCHR NO. -C-96-010

ALASKA STATE COMMISSION FOR HUMAN RIGHTS, PAULA M. HALEY EXECUTIVE DIRECTOR, EX REL. KRISTIANN RUTZLER,

COMPLAINANT,

v.

ALASKA PACIFIC UNIVERSITY,

RESPONDENT.

AMENDED COMPLAINT

Paula M. Haley, Executive director of the Alaska State Commission for Human Rights, submits the following for her amended complaint:

1. Kristiann Rutzler, "Ms. Rutzler," has been a student at Alaska Pacific University since September 5, 1995.

2. Alaska Pacific University, "APU," is a non profit corporation operating as an educational institution.

3. APU owns residential apartments that it rents to its students.

4. On or about the beginning of September 1995, Ms. Rutzler sought to rent an apartment at University Court from APU.

5. At the time Ms. Rutzler sought to rent the apartment from APU, APU rented apartments at University Court to both single and married students.

6. Ms. Rutzler, who was unmarried, proposed to occupy the apartment with her boyfriend.

7. Initially, APU's Housing Director refused to rent the apartment to Ms. Rutzler because she was not married to her boyfriend.

8. On or about October 8, 1995 APU granted Ms. Rutzler a month to month lease, but told her that she should keep the tenancy confidential and that she should look for off campus housing.

9. The terms of the lease APU granted to Ms. Rutzler were not the same as the terms of leases APU granted to married students renting comparable apartments at University Court.

10. On May 23, 1996, APU adopted a policy of renting apartments at University Court to married students or disabled single students.

11. Under the new policy Ms. Rutzler is not eligible to rent an apartment at University Court and reside in the apartment with her boyfriend because she is not married.

12. APU has agreed to continue renting the apartment to Ms. Rutzler pending the outcome of this administrative proceeding.

13. On January 12, 1996, Ms. Rutzler filed an administrative complaint with the Commission alleging that APU was discriminating against her in violation of AS 18.80.240 because of her marital status.

14. On April 2, 1996, the Commission's staff determined that substantial evidence supported Ms. Rutzler's allegations.

15. On June 6, 1996, Executive Director Haley certified that conciliation had failed.

16. APU continues to discriminate against Ms. Rutzler because of her marital status in violation AS 18.80.240 by refusing to

rent an apartment at University Court to her on the same terms offered to married students and by threatening to discontinue her tenancy pursuant to its policy of May 23, 1996.

Wherefore the complainant asks for the following relief:

1. An order requiring APU to rent an apartment at University Court to Ms. Rutzler on the same terms as married students and to allow her to reside in the apartment with her boyfriend.

2. An order requiring APU to modify its housing policies to provide that on campus housing will be rented to other-wise eligible students without regard to their marital status.

Dated: 1/31/97

ALASKA STATE COMMISSION FOR HUMAN RIGHTS

By: /s/ Mark A. Ertischek
Mark A. Ertischek
Human Rights Advocate

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

Case. No. A95-274 Civ. (HRH)

GARY BAKER, JOYCE BAKER, and KEVIN THOMAS,

Plaintiff,

v.

ANCHORAGE EQUAL RIGHTS COMMISSION, the MUNICIPALITY OF ANCHORAGE and PAULA HALEY in her official capacity as the EXECUTIVE DIRECTOR OF THE ALASKA STATE COMMISSION ON HUMAN RIGHTS,

Defendants.

AFFIDAVIT OF KEVIN THOMAS

UNITED STATES OF AMERICA)
) ss.
STATE OF ALASKA)

I, Kevin Thomas, being duly sworn upon oath, depose and state:

1. I am one of the Plaintiffs in this action, and I have personal knowledge of the matters stated below.

2. I am a member of the Christian faith. I have attended and served the Christian Church for many years. I have served the Christian Church by working with Christian youth for a number of years. As a Christian, my religious beliefs are based upon the Bible, which I sincerely believe to be the absolute, true, and infallible word of God.

3. An elder or deacon in the Christian Church is a man who oversees the affairs of the Church. The qualifications of being an elder or a deacon in the Christian Church are set forth in the Bible at 1 Timothy 3:1-17 and Titus 1:5-9.

4. As a Christian, I believe in the sanctity of the marriage relationship and in the promotion and protection of that relationship over any of the world's current trendy or politically correct alternatives. I believe in the importance of the traditional family, and I believe it is important to promote and protect the family values that eminent from traditional family relationships.

5. Based upon my Christian beliefs, I also sincerely believe that cohabitation between unmarried couples, meaning a man and a woman living together in a sexual relationship outside of marriage, is contrary to God's law, constitutes the sin of fornication, and is grievously offensive to God. I also believe that it is wrong for an unrelated man and woman to live together. I believe that in order to assist or facilitate someone else's cohabitation, I would commit a sin myself or would disqualify myself from serving as an elder in the Christian Church. I believe this because of my understanding of God's word in the Bible, and because I am convinced that God would not have me, or an elder in his Church, participate in, assist, or facilitate someone else's sinful conduct. I particularly believe I should not assist someone in conduct which is harmful to them physically, mentally, emotionally, and spiritually. I believe that unmarried cohabitation has these adverse physical, mental, emotional, and spiritual impacts upon people. I believe that an unmarried man and woman living together creates the appearance of sin. I am also a member of a Christian Church, and I sincerely believe that God would have me demonstrate to my fellow Christians the sanctity of the marriage relationship and the importance of living a life consistent with God's word in the Bible.

6. My beliefs regarding cohabitation are not unique to myself but, rather, are rooted in a widely held tradition within Christianity which extends back to the Old Testament (Exodus 22:16; Leviticus 19:20; Deuteronomy 22:13-21, 23:17; Proverbs 2:16, 5:3-6, 6:24-29, 7, 29:3; Ecclesiastes 7:26; Hosea 4:11) and includes the New Testament (Acts 15:19-20; Jude 7; Revelation 2:14, 21:18, 22:15), the teachings of the Lord Jesus Christ (Matthew 15:16-20, Mark 7:18-23), the teachings of the Apostle Paul (Romans 1:29; I Corinthians 5:9-11, 6:9; II Corinthians 12:21; Galatians 5:19-21; Ephesians 5:5; Colossians 3:5-6; I Thessalonians 4:3; I Timothy 1:8-11; Hebrews 13:4), the teachings of the Apostle Peter (I Peter 4:1-6), and the theology of the reformation leader, John Calvin (John Calvin, *Calvin's Commentaries: The Epistle of Paul to the Romans and to the Thessalonians* (Ross Mackenzie trans.)). My Christian beliefs, including my beliefs regarding cohabitation are sincere and are indelible part of my life.

7. In addition to being a Christian, I own and manage by myself and jointly with others rental properties within Anchorage, Alaska.

8. I sincerely believe that my faith is to be lived out in every aspect of my life. I commit myself to practice my Christian faith in all aspects of my life, including my commercial activities as a landlord. I operate my rental business and I rent my property without regard to race, religion, gender, and marital status. I rent property to persons of all races, persons of all religions, persons of both genders, single persons, men and women married to one another, separated, divorced, or widowed persons, and single parents or grandparents. However, based solely upon my sincere Christian beliefs regarding cohabitation, I decline to rent property to unmarried cohabitors.

9. I decline to rent to unmarried couples, not so that I can try to control their conduct, but instead so I can control my own conduct and try to conform my own conduct to be consistent with what I understand and believe to be God's command for me. Also, as I mentioned above, I am a member of a Christian Church, and I believe that if I were to disregard my Christian beliefs and rent property to unmarried couples, I would make myself a hypocrite in the eyes of my fellow Christians.

10. I never hide, conceal, or lie about my Christian beliefs regarding cohabitation, and I am honest with unmarried couples as to why I don't rent to them. I do this because as a Christian I believe it would be contrary to God's will for me to lie or be untruthful with other people. I also believe it would be wrong to hide my Christian beliefs, since I believe that the Lord Jesus desires for me to stand up and be recognized as his child and follower.

11. I am aware that in the past, the Anchorage Equal Rights Commission ("AERC") and the Alaska State Commission for Human Rights ("ASCHR") have pursued legal action against landlords with Christian beliefs similar to my own.

12. I am aware that in the past, the Anchorage Equal Rights Commission ("AERC") and the Alaska State Commission for Human Rights ("ASCHR") have pursued legal action against landlords with Christian beliefs similar to mine. In particular, I am aware that the AERC and the ASCHR have taken action, and threatened action, against Tom Swanner and a married couple by the name of Foreman. I am aware that these landlords have been subjected to legal action designed to force them to rent property to unmarried couples regardless of their Christian beliefs against cohabitation. I am also aware that the action against these other landlords with Christian beliefs

similar to mine has caused them great emotional, spiritual, and financial hardship.

13. I have previously declined to rent property to unmarried couples who intended to cohabit my property. I continue to decline to rent to unmarried cohabitors at this time, but periodically are required to turn such unmarried cohabitors away in order to remain true to my Christian convictions. Although I remain true to my Christian convictions, because of my knowledge of the applicable anti-marital status discrimination laws and because of my knowledge of the AERC's and ASCHR's past enforcement of those laws against the Foremans and Swanner, I daily face what I view as a real and immediate threat, and actually the inevitable result, that the AERC and/or the ASCHR, through its Executive Director, Paula Haley, will take action against me because of my Christian beliefs against cohabitation. This cloud of threatened legal action presently hampers and chills my motivation to continue living in a manner consistent with my Christian beliefs against cohabitation. As I mentioned above, I presently remain true to my Christian convictions against renting to unmarried cohabitors, but I do so only with fear and apprehension, and subject to the temptation to forfeit my religious beliefs against renting to unmarried cohabitors. I understand at this time that the only way that I can remain true to my Christian convictions against unmarried cohabitation, and also remain true to my religious convictions against cohabitation, and also remain in the property rental business, is to break the law. The concept of breaking the law in the conduct of my rental business causes me even further religious turmoil because I understand that the Bible teaches in Romans 13 that God would have us honor the government and its laws.

DATED this 2 day of May, 1996.

/s/ Kevin Thomas
Kevin Thomas

SUBSCRIBED AND SWORN TO OR AFFIRMED before me this 2nd day of May, 1996.

/s/ Yolanda C. Wray
YOLANDA C. WRAY
Notary Public in and for Alaska
My commission expires: 11/10/99

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

Case. No. A95-275 Civ. (HRH)

GARY BAKER and JOYCE BAKER,

Plaintiffs,

v.

ANCHORAGE EQUAL RIGHTS COMMISSION, the MUNICIPALITY OF ANCHORAGE and PAULA HALEY in her official capacity as the EXECUTIVE DIRECTOR OF THE ALASKA STATE COMMISSION ON HUMAN RIGHTS,

Defendant.

AFFIDAVIT OF JOYCE BAKER

UNITED STATES OF AMERICA)
) ss.
STATE OF ALASKA)

I, Joyce Baker, being duly sworn upon oath, depose and state:

1. I am one of the Plaintiffs in this action, and I have personal knowledge of the matters stated below.

2. I am a member of the Christian faith. I have attended and served the Christian Church for more than fifteen years. As a Christian, my religious beliefs are based upon the Bible, which I sincerely believe to be the absolute, true, and infallible word of God.

3. A deaconess in the Christian Church is a woman who assists in overseeing the affairs of the Church. The

qualifications for being a deaconess in the Christian Church are set forth in the Bible at 1 Timothy 3:1-17 and Titus 1:5-9.

4. As a Christian, I believe in the sanctity of the marriage relationship and in the promotion and protection of that relationship over any of the world's current trendy or politically correct alternatives. I believe in the importance of the traditional family, and I believe it is important to promote and protect the family values that emanate from traditional family relationships.

5. Based upon my Christian beliefs, I also sincerely believe that cohabitation between unmarried couples, meaning a man and a woman living together in a sexual relationship outside of marriage, is contrary to God's law, constitutes the sin of fornication, and is grievously offensive to God. I believe that in order to assist or facilitate someone else's cohabitation, I would commit a sin myself or would disqualify myself from serving as an elder in the Christian Church. I believe this because of my understanding of God's word in the Bible, and because I am convinced that God would not have me, or an elder in his Church, participate in, assist, or facilitate someone else's sinful conduct. I particularly believe I should not assist someone in conduct which is harmful to them physically, mentally, emotionally, and spiritually. I believe that unmarried cohabitation has these adverse physical, mental, emotional, and spiritual impacts upon people. I am also a member of a Christian Church, and I sincerely believe that God would have me demonstrate to my fellow Christians the sanctity of the marriage relationship and the importance of living a life consistent with God's word in the Bible.

6. My beliefs regarding cohabitation are not unique to myself but, rather, are rooted in a widely held tradition within Christianity which extends back to the Old Testament (Exodus 22:16; Leviticus 19:20; Deuteronomy 22:13-21, 23:17;

Proverbs 2:16, 5:3-6, 6:24-29, 7, 29:3; Ecclesiastes 7:26; Hosea 4:I1) and includes the New Testament (Acts 15:19-20; Jude 7; Revelation 2:14, 21:18, 22:15), the teachings of the Lord Jesus Christ (Matthew 15:16-20, Mark 7:18-23), the teachings of the Apostle Paul (Romans 1:29; I Corinthians 5:9-11, 6:9; II Corinthians 12:21; Galatians 5:19-21; Ephesians 5:5; Colossians 3:5-6; I Thessalonians 4:3; I Timothy 1:8-11; Hebrews 13:4), the teachings of the Apostle Peter (I Peter 4:1-6), and the theology of the reformation leader, John Calvin, (John Calvin, *Calvin's Commentaries: The Epistle of Paul to the Romans and to the Thessalonians* (Ross Mackenzie trans.)). My Christian beliefs, including my beliefs regarding cohabitation are sincere and are an indelible part of my life.

7. In addition to being a Christian, I and my husband, Gary Baker, are the owners of five rental properties within Anchorage, Alaska. These properties are described more particularly as follows:

(a) a single family unit home located at 7650 Little Bend Circle, Anchorage, Alaska 99507;

(b) a single family unit home located at 1735 Cedrus Circle, Anchorage, Alaska 99507;

(c) a single family unit home located at 7716 Chaimi Loop, Anchorage, Alaska 99504;

(d) a single family unit home located at 324 E. 9th Ave., Anchorage, Alaska 99501; and

(e) a two family unit duplex located at 3216 E. 46th Ave., Anchorage, Alaska 99507. My husband and I currently reside in the home located at Cedrus Circle, but we have rented this home to residential tenants in the past, and anticipate that we will rent the Cedrus Circle home to tenants again at some point in the future. Our four remaining rental properties are all

currently on the market for rental and/or currently occupied by tenants.

8. My husband and I sincerely believe that our faith is to be lived out in every aspect of our lives. We each commit ourselves to practice our Christian faith in all aspects of our lives, including our commercial activities as landlords. We operate our rental business and we rent our property without regard to race, religion, gender, and marital status. We rent property to persons of all races, persons of all religions, persons of both genders, single persons, men and women married to one another, separated, divorced, or widowed persons, and single parents or grandparents. However, based solely upon our sincere Christian beliefs regarding cohabitation, we decline to rent property to unmarried cohabitors.

9. We decline to rent to unmarried couples, not so that we can try to control their conduct, but instead so that we can control our own conduct and try to conform our own conduct to be consistent with what we understand and believe to be God's command for us. Also, as I mentioned above, I am a member of a Christian Church, and I believe that if I were to disregard my Christian beliefs and rent property to unmarried couples, I would make myself a hypocrite in the eyes of my fellow Christians.

10. My husband and I never hide, conceal, or lie about our Christian beliefs regarding cohabitation, and we are honest with unmarried couples as to why we don't rent to them. We do this because as Christians we believe it would be contrary to God's will for us to lie or be untruthful with other people. We also believe it would be wrong to hide our Christian beliefs, since we believe that the Lord Jesus desires us to stand up and be recognized as his children and followers.

11. We are aware that in the past, the Anchorage Equal Rights Commission ("AERC") and the Alaska State

Commission for Human Rights ("ASCHR") have pursued legal action against landlords with Christian beliefs similar to our own. In particular, we are aware that the AERC and the ASCHR have taken action, and threatened action, against Tom Swanner and a married couple by the name of Foreman. We are aware that these landlords have been subjected to legal action designed to force them to rent property to unmarried couples regardless of their Christian beliefs against cohabitation. We are also aware that the action against these other landlords with Christian beliefs similar to our own has caused them great emotional, spiritual, and financial hardship.

12. My husband and I have previously declined to rent property to unmarried couples who intended to cohabit our property. We continue to decline to rent to unmarried cohabitors at this time, but periodically are required to turn such unmarried cohabitors away in order to remain true to our Christian convictions. Although we remain true to our Christian convictions, because of our knowledge of the applicable anti-marital status discrimination laws and because of our knowledge of the AERC's and ASCHR's past enforcement of those laws against the Foremans and Swanner, we daily face what we view as a real and immediate threat, and actually the inevitable result, that the AERC and/or the ASCHR, through its Executive Director, Paula Haley, will take action against us because of our Christian beliefs against cohabitation. This cloud of threatened legal action presently hampers and chills my husband's and my own motivation to continue living in a manner consistent with our Christian beliefs against cohabitation. As I mentioned above, we presently remain true to our Christian convictions against renting to unmarried cohabitors, but we do so only with fear and apprehension, and subject to the temptation to forfeit our religious beliefs against renting to unmarried cohabitors. We understand at this time that the only way that we can remain true to our Christian

convictions against unmarried cohabitation, and also remain true to our religious convictions against cohabitation, and also remain in the property rental business, is to break the law. The concept of breaking the law in the conduct of our rental business causes my husband and I even further religious turmoil because we understand that the Bible teaches in Romans 13 that God would have us honor the government and its laws.

DATED this 20th day of November, 1995.

/s/ Joyce Baker
JOYCE BAKER

SUBSCRIBED AND SWORN TO OR AFFIRMED before me this 20th day of November, 1995.

/s/ Kevin G. Clarkson
KEVIN G. CLARKSON
Notary Public in and for Alaska
My commission expires: 12-4-97

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

Case. No. A95-274 Civ. (HRH)

GARY BAKER, JOYCE BAKER, and KEVIN THOMAS,

Plaintiff,

v.

ANCHORAGE EQUAL RIGHTS COMMISSION, the MUNICIPALITY OF ANCHORAGE and PAULA HALEY in her official capacity as the EXECUTIVE DIRECTOR OF THE ALASKA STATE COMMISSION ON HUMAN RIGHTS,

Defendants.

SECOND AFFIDAVIT OF JOYCE BAKER

UNITED STATES OF AMERICA)
) ss.
STATE OF ALASKA)

I, Joyce Baker, being duly sworn upon oath, depose and state:

1. I am one of the Plaintiffs in this action, and I have personal knowledge of the matters stated below.

2. As a Christian I believe that it is wrong for an unrelated and unmarried woman and man to live together. Even in the event that this type of a relationship were purely platonic, and I believe that such a possibility would be highly unlikely, I still believe that such a living arrangement would violate God's law because it would create the appearance of sin, or the temptation for sexual impropriety. I would not rent property to an unrelated and unmarried couple whether I had knowledge or

not of their intention to engage in sexual activity outside marriage.

DATED this 29th day of January, 1996.

/s/ Joyce Baker
JOYCE BAKER

SUBSCRIBED AND SWORN TO OR AFFIRMED before me this 29th day of January, 1996.

/s/ Janice M. Snyder
Notary Public in and for Alaska
My commission expires: 4/26/99

[certificate of mailing omitted in printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

Case. No. A95-275 Civ. (HRH)

GARY BAKER and JOYCE BAKER,

Plaintiffs,

v.

ANCHORAGE EQUAL RIGHTS COMMISSION, the MUNICIPALITY OF ANCHORAGE and PAULA HALEY in her official capacity as the EXECUTIVE DIRECTOR OF THE ALASKA STATE COMMISSION ON HUMAN RIGHTS,

Defendant.

AFFIDAVIT OF GARY BAKER

UNITED STATES OF AMERICA)
) ss.
STATE OF ALASKA)

I, Gary Baker, being duly sworn upon oath, depose and state:

1. I am one of the Plaintiffs in this action, and I have personal knowledge of the matters stated below.

2. I am a member of the Christian faith. I have attended and served the Christian Church for more than fifteen years. I have served the Christian Church, particularly the Church of Tanana, Alaska, as an elder, part-time pastor, and lay pastor for a number of years. As a Christian, my religious beliefs are based upon the Bible, which I sincerely believe to be the absolute, true, and infallible word of God.

3. As mentioned above, in addition to being a part-time pastor and a lay pastor, I have on occasion served as an elder in the churchs I have attended over the years. An elder or deacon in the Christian Church is a man who oversees the affairs of the Church. The qualifications of being an elder or a deacon in the Christian Church are set forth in the Bible at 1 Timothy 3:1-17 and Titus 1:5-9.

4. As a Christian, I believe in the sanctity of the marriage relationship and in the promotion and protection of that relationship over any of the world's current trendy or politically correct alternatives. I believe in the importance of the traditional family, and I believe it is important to promote and protect the family values that emminate from traditional family relationships.

5. Based upon my Christian beliefs, I also sincerely believe that cohabitation between unmarried couples, meaning a man and a woman living together in a sexual relationship outside of marriage, is contrary to God's law, constitutes the sin of fornication, and is grievously offensive to God. I believe that in order to assist or facilitate someone else's cohabitation, I would commit a sin myself or would disqualify myself from serving as an elder in the Christian Church. I believe this because of my understanding of God's word in the Bible, and because I am convinced that God would not have me, or an elder in his Church, participate in, assist, or facilitate someone else's sinful conduct. I particularly believe I should not assist someone in conduct which is harmful to them physically, mentally, emotionally, and spiritually. I believe that unmarried cohabitation has these adverse physical, mental, emotional, and spiritual impacts upon people. I am also a member of a Christian Church, and I sincerely believe that God would have me demonstrate to my fellow Christians the sanctity of the marriage relationship and the importance of living a life consistent with God's word in the Bible.

6. My beliefs regarding cohabitation are not unique to myself but, rather, are rooted in a widely held tradition within Christianity which extends back to the Old Testament (Exodus 22:16; Leviticus 19:20; Deuteronomy 22:13-21; 23:17; Proverbs 2:16, 5:3-6, 6:24-29, 7, 29:3; Ecclesiastes 7:26; Hosea 4:11) and includes the New Testament (Acts 15:19-20; Jude 7: Revelation 2:14, 21:18, 22:15), the teachings of the Lord Jesus Christ (Matthew 15:16-20, Mark 7:18-23), the teachings of the Apostle Paul (Romans 1:29; I Corinthians 5:9-11, 6:9; II Corinthians 12:21; Galatians 5:19-21; Ephesians 5:5; Colossians 3:5-6; I Thessalonians 4:3, I Timothy 1:8-11; Hebrews 13:4), the teachings of the Apostle Peter (I Peter 4:1-6), and the theology of the reformation leader, John Calvin (John Calvin, *Calvin's Commentaries: The Epistle of Paul to the Romans and to the Thessalonians* (Ross Mackenzie trans.)). My Christian beliefs, including my beliefs regarding cohabitation are sincere and are an indelible part of my life.

7. In addition to being a Christian, I and my wife, Joyce Baker, are the owners of five rental properties within Anchorage, Alaska. These properties are described more particularly as follows:

(a) a single family unit home located at 7650 Little Bend Circle, Anchorage, Alaska 99507;

(b) a single family unit home located at 1735 Cedrus Circle, Anchorage, Alaska 99507;

(c) a single family unit home located at 7716 Chaimi Loop, Anchorage, Alaska 99504;

(d) a single family unit home located at 324 E. 9th Ave., Anchorage, Alaska 99501; and

(e) a two family unit duplex located at 3216 E. 46th Ave., Anchorage, Alaska 99507. My wife and I currently reside in the home located at Cedrus Circle, but we have rented this

home to residential tenants in the past, and anticipate that we will rent the Cedrus Circle home to tenants again at some point in the future. Our four remaining rental properties are all currently on the market for rental and/or currently occupied by tenants.

8. My wife and I sincerely beliefe that our faith is to be lived out in every aspect of our lives. We each commit ourselves to practice our Christian faith in all aspects of our lives, including our commercial activities as landlords. We operate our rental business and we rent our property without regard to race, religion, gender, and marital status. We rent property to persons of all races, persons of all religions, persons of both genders, single persons, men and women married to one another, separated, divorced, or widowed persons, and single parents or grandparents. However, based solely upon our sincere Christian beliefs regarding cohabitation, we decline to rent property to unmarried cohabitors.

9. We decline to rent to unmarried couples, not so that we can try to control their conduct, but instead so that we can control our own conduct and try to conform our own conduct to be consistent with what we understand and believe to be God's command for us. Also, as I mentioned above, I am a member of a Christian Church, and I believe that if I were to disregard my Christian beliefs and rent property to unmarried couples, I would make myself a hypocrite in the eyes of my fellow Christians.

10. My wife and I never hide, conceal, or lie about our Christian beliefs regarding cohabitation, and we are honest with unmarried couples as to why we don't rent to them. We do this because as Christians we believe it would be contrary to God's will for us to lie or be untruthful with other people. We also believe it would be wrong to hide our Christian beliefs, since

we believe that the Lord Jesus desires us to stand up and be recognized as children and followers.

11. We are aware that in the past, the Anchorage Equal Rights Commission ("AERC") and the Alaska State Commission for Human Rights ("ASCHR") have pursued legal action against landlords with Christian beliefs similar to our own. In particular, we are aware that the AERC and the ASCHR have taken action, and threatened action, against Tom Swanner and a married couple by the name of Foreman. We are aware that these landlords have been subjected to legal action designed to force them to rent property to unmarried couples regardless of their Christian beliefs against cohabitation. We are also aware that the action against these other landlords with Christian beliefs similar to our own has caused them great emotional, spiritual, and financial hardship.

12. My wife and I have previously declined to rent property to unmarried couples who intended to cohabit our property. We continue to decline to rent to unmarried cohabitors at this time, but periodically are required to turn such unmarried cohabitors away in order to remain true to our Christian convictions. Although we remain true to our Christian convictions, because of our knowledge of the applicable anti-marital status discrimination laws and because of our knowledge of the AERC's and ASCHR's past enforcement of those laws against the Foremans and Swanner, we daily face what we view as a real and immediate threat, and actually the inevitable result, that the AERC and/or the ASCHR, through its Executive Director, Paula Haley, will take action against us because of our Christian beliefs against cohabitation. This cloud of threatened legal action presently hampers and chills my wife and my own motivation to continue living in a manner consistent with our Christian beliefs against cohabitation. As I mentioned above, we presently remain true to our Christian convictions against renting to unmarried cohabitors, but we do

so only with fear and apprehension, and subject to the temptation to forfeit our religious beliefs against renting to unmarried cohabitors. We understand at this time that the only way that we can remain true to our Christian convictions against unmarried cohabitation, and also remain true to our religious convictions against cohabitation, and also remain in the property rental business, is to break the law. The concept of breaking the law in the conduct of our rental business causes my wife and I even further religious turmoil because we understand that the Bible teaches in Romans 13 that God would have us honor the government and its laws.

DATED this 21 day of Nov, 1995.

/s/ Gary J. Baker
Gary Baker

SUBSCRIBED AND SWORN TO OR AFFIRMED before me this 21st day of November, 1995.

/s/ Janice M. Snyder
Notary Public in and for Alaska
My commission expires: 4/26/99

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

Case. No. A95-274 Civ. (HRH)

GARY BAKER, JOYCE BAKER, and KEVIN THOMAS,

Plaintiff,

v.

ANCHORAGE EQUAL RIGHTS COMMISSION, the MUNICIPALITY OF ANCHORAGE and PAULA HALEY in her official capacity as the EXECUTIVE DIRECTOR OF THE ALASKA STATE COMMISSION ON HUMAN RIGHTS,

Defendants.

SECOND AFFIDAVIT OF GARY BAKER

UNITED STATES OF AMERICA)
) ss.
STATE OF ALASKA)

I, Gary Baker, being duly sworn upon oath, depose and state:

1. I am one of the Plaintiffs in this action, and I have personal knowledge of the matters stated below.

2. As a Christian I believe that it is wrong for an unrelated and unmarried woman and man to live together. Even in the event that this type of relationship were purely platonic, and I believe that such a possibility would be highly unlikely, I still believe that such a living arrangement would violate God's law because it would create the appearance of sin, or the temptation for sexual impropriety. I would not rent property to

an unrelated and unmarried couple whether I had knowledge or not of their intention to engage in sexual activity outside marriage.

DATED this 29 day of Jan, 1996.

/s/ Gary J. Baker
GARY BAKER

SUBSCRIBED AND SWORN TO OR AFFIRMED before me this 29th day of January, 1996.

/s/ Janice M. Snyder
Notary Public in and for Alaska
My commission expires: 4/26/99

[certificate of mailing omitted in printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

Case. No. A95-274 Civ. (HRH)

GARY BAKER, JOYCE BAKER, and KEVIN THOMAS,

Plaintiff,

v.

ANCHORAGE EQUAL RIGHTS COMMISSION, the MUNICIPALITY OF ANCHORAGE and PAULA HALEY in her official capacity as the EXECUTIVE DIRECTOR OF THE ALASKA STATE COMMISSION ON HUMAN RIGHTS,

Defendants.

AFFIDAVIT OF TOM SWANNER

UNITED STATES OF AMERICA)
) ss.
STATE OF ALASKA)

I, Tom Swanner, being duly sworn upon oath, depose and state:

1. I have personal knowledge of the matters stated below.

2. On January 9, 1996, I called the AERC office and spoke with a member of the AERC staff by the name of Sam Cornell. I called the AERC for the purpose of determining if the AERC had any pending marital status complaints pending against me and in the course of the conversation asked Cornell whether the AERC would pursue action against me if tenants were to file a complaint claiming that I had turned the tenants

away because the tenants were unmarried and wanted to live together in my property.

3. Cornell informed me that the AERC would not hesitate to pursue enforcement of a marital status discrimination complaint against me based upon my refusing to rent property to unmarried couples. Cornell informed me that this fact was confirmed by the AERC Executive Director, Steven Holt.

4. Cornell informed me that the AERC would pursue such a complaint against me or any other landlord who refused to rent property to unmarried couples.

DATED this 12 day of February, 1996.

/s/ Tom Swanner
TOM SWANNER

SUBSCRIBED AND SWORN TO OR AFFIRMED before me this 12th day of February, 1996.

/s/ Sharon Starlene Smith
SHARON STARLENE SMITH
Notary Public in and for Alaska
My commission expires: 10-17-98

APPENDIX I

BEFORE THE ALASKA STATE COMMISSION
FOR HUMAN RIGHTS

ASCHR NO. -C-96-010

ALASKA STATE COMMISSION FOR HUMAN RIGHTS, PAULA M. HALEY EXECUTIVE DIRECTOR, EX REL. KRISTIANN RUTZLER,

COMPLAINANT,

v.

ALASKA PACIFIC UNIVERSITY,

RESPONDENT.

NOTICE OF PREHEARING CONFERENCE

I will hold a prehearing conference in the above-captioned case on Thursday, September 21, 2000 at 1:00 p.m. at the Alaska Sate Commission for Human Rights, 800 A Street, Suite 204, Anchorage, AK 99501. If you are unable to attend, please arrange to participate by telephone and, prior to the day set for the conference, please provide me with the number where you can be reached. If you are unable to participate at the time scheduled, please confer with the other party and file a request for a continuance with three proposed alternative dates and times. Note: Parties are required to pay the cost of long distance phone calls.

If you are a person with a disability who may need a special modification in order to participate in the conference, please contact me prior to the date set, to make any necessary

arrangements.

At the prehearing conference, please be prepared to discuss the following matters: hearing dates; prehearing deadlines; estimated number of witnesses; estimated length of hearing; necessity of prehearing briefing and dates for submissions of briefs; and, any other matters which may aid in resolving the issues in these proceedings.

All filings should be directed to the Hearing Examiner at the Alaska State Commission for Human Rights, 800 A Street, Suite 204, Anchorage, AK 99501-3669. Please note that a party filing a written communication with the Hearing Examiner must serve a copy of the communication on all other parties to the proceeding. Thus, for example, although the Human Rights Advocate has the same mailing address as the Hearing Examiner, the Human Rights Advocate must be copied separately with anything filed with the Hearing Examiner. (The Code of Judicial Conduct expressly prohibits the Hearing Examiner from discussing the substance or merits of this matter with any party unless the other parties are also present.)

Dated: 9/7/00

ALASKA STATE COMMISSION FOR HUMAN RIGHTS

By: /s/ Nathaniel B. Atwood
Nathaniel B. Atwood
Hearing Examiner

Certificate of Service:
I certify that on September 7, 2000, a true and correct copy of this Notice of Prehearing Conference was mailed or delivered to the following parties:

Stephen Koteff, Esq.
Human Rights Advocate
Alaska State Commission for Human Rights
800 A Street, Suite 204
Anchorage, Alaska 99501 (hand delivered)

Thomas P. Owens, Jr.
Owens & Turner
1500 West 33rd Avenue, Suite 200
Anchorage, AK 99503-3502 (by fax/mail)

Supreme Court, U.S.
FILED
DEC 28 2000
OFFICE OF THE CLERK

No. 00-499

In The

Supreme Court of the United States

KEVIN THOMAS AND JOYCE BAKER,

Petitioners,

v.

ANCHORAGE EQUAL RIGHTS COMMISSION, MUNICIPALITY OF ANCHORAGE, PAULA HALEY, in her official capacity as the Executive Director of the Alaska State Commission for Human Rights,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

MEMORANDUM OF ANCHORAGE EQUAL RIGHTS COMMISSION AND MUNICIPALITY OF ANCHORAGE

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MEMORANDUM OF ANCHORAGE EQUAL RIGHTS COMMISSION AND MUNICIPALITY OF ANCHORAGE

Respondents Anchorage Equal Rights Commission and the Municipality of Anchorage agree with the argument set forth in the Brief in Opposition to Petition for Writ of Certiorari that will be submitted on behalf of respondent Paula Haley. The Anchorage Equal Rights Commission and the Municipality of Anchorage join in that brief and ask the Court to deny the Petition for Writ of Certiorari. Neither the Anchorage Equal Rights Commission nor the Municipality of Anchorage intends to submit a brief if its own.

DATED this 28th day of December, 2000.

CONSTANCE E. LIVSEY
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(3)

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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48 pp

QUESTION PRESENTED

Whether the court of appeals correctly applied well-settled standing and ripeness principles when it dismissed the landlords' pre-enforcement challenge to state and municipal laws prohibiting discrimination in the rental of housing based upon a tenant's marital status, where the record demonstrates that:

1. no prospective tenant has ever complained to the landlords;

2. no prospective tenant has ever filed an administrative complaint against the landlords with any civil rights enforcement agency;

3. neither the state nor the municipality has ever initiated an investigation into the landlords' rental practices;

4. neither the state nor the municipality has ever commenced a civil enforcement action or criminal prosecution against the landlords under the challenged laws;

5. no civil rights enforcement agency has ever threatened the landlords with future enforcement of the challenged laws;

6. the landlords cannot identify any prospective tenants they turned away due to their marital status in the past;

7. the landlords do not know to whom, when, where or under what circumstances they might violate the challenged laws in the future;

8. past enforcement of the challenged laws was civil only, and was always precipitated by the filing of complaints by potential tenants;

QUESTION PRESENTED – Continued

9. the landlords' asserted injury is speculative and may never occur; and

10. the landlords will suffer no hardship if a federal court declines to consider their case.

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STATEMENT OF FACTS AND PROCEEDINGS

Respondent Paula M. Haley, in her official capacity as Executive Director of the Alaska State Commission for Human Rights ("ASCHR"), adopts and incorporates by reference the statement of facts and proceedings contained in the decision of the United States Court of Appeals for the Ninth Circuit in *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134 (9th Cir. 2000); Pet. App. A (App. 1a). In *Thomas*, the court dismissed without prejudice the claims of Joyce Baker and Kevin Thomas ("the landlords") for their standing and ripeness deficiencies. *Id.* at 1142. Their claims are based upon the following facts.

The landlords own residential rental property in Anchorage, Alaska. They filed suit, seeking a religious exemption from Alaska's anti-discrimination in housing statute, which prohibits landlords from discriminating against tenants based on their marital status. Alaska Stat. § 18.80.240 (1987). Under Alaska law, "marital status" discrimination includes discrimination against unmarried couples. *Foreman v. Anchorage Equal Rights Comm'n*, 779 P.2d 1199, 1202 (Alaska 1989).

The landlords allege that, according to their Christian beliefs, cohabitation between unmarried couples is a sin. They believe that renting housing to an unmarried couple would facilitate sin, and that to facilitate sin is to sin themselves. They allege that they fear Respondent Haley – who oversees investigations of discrimination complaints filed with ASCHR – will enforce the anti-discrimination law against them, which they allege would violate the free exercise of their religion. No one has ever filed a

discrimination complaint with ASCHR against the landlords, and Respondent Haley has never threatened them with enforcement of the Alaska's anti-discrimination-in-housing law or with any other statute. (Resp. App. 3).

REASONS FOR DENYING THE WRIT

The court of appeals properly dismissed the landlords' declaratory judgment action because it fails to present a justiciable case and controversy under Article III of the United States Constitution. None of the criteria governing certiorari warrant this Court's review of that decision. The decision is consistent with Supreme Court cases addressing Article III standing and ripeness requirements as applied to the unique and specific facts of this case. The decision rests solely upon the landlords' own failure to set forth facts sufficient to satisfy well-settled standing and ripeness requirements as articulated by this Court. Further, it creates no conflict among the federal courts of appeals. The cases from other circuits that the landlords cite involve application of the same well-settled principles of Article III and are based upon particular factual situations not present here. Finally, this case does not raise important unanswered questions of constitutional law. Accordingly, this Court has no reason to review this case.

I. THE DECISION BELOW DOES NOT CONFLICT WITH THIS COURT'S DECISIONS ADDRESSING ARTICLE III STANDING AND RIPENESS.

The court of appeals applied well-settled principles of standing and ripeness to the particular facts of this case, and concluded that because the landlords failed to establish a credible threat of prosecution, they did not present a ripe case. As the parties attempting to invoke federal jurisdiction, the landlords have the burden to set forth facts sufficient to satisfy the standing and ripeness requirements of Article III.[1] *Bennett v. Spear*, 520 U.S. 154, 167-68 (1997).

A federal court cannot create jurisdiction by embellishing otherwise deficient allegations that fail to satisfy the requirements of Article III. *Whitmore v. Arkansas*, 495 U.S. 149, 155-56 (1990). Consequently, "[t]he jurisdictional

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[1] Standing is the constitutional requirement under Article III that a plaintiff allege a judicially cognizable injury in order to pursue the lawsuit. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-61 (1992). The essence of a standing question is whether the plaintiff has alleged "such a personal stake in the outcome of the controversy as to assure the concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for the illumination of difficult constitutional questions." *Baker v. Carr*, 369 U.S. 186, 204 (1962). Thus, standing focuses on the party bringing suit, not on the issues he or she wishes to be adjudicated. *Flast v. Cohen*, 392 U.S. 83, 99 (1968). Ripeness is "peculiarly a question of timing" and is drawn both from Article III limitations on judicial power and from prudential considerations for refusing to exercise jurisdiction. *Buckley v. Valeo*, 424 U.S. 1, 114 (1976). The ripeness doctrine precludes federal courts from exercising their jurisdiction over an action that is filed before a real dispute exists between the parties. *Poe v. Ulman*, 367 U.S. 497, 507 (1961).

power of the United States defined by Article III is not an unconditioned authority to determine the constitutionality of legislative or executive acts." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471 (1982). Rather, issues of constitutionality must be resolved in the context of a concrete factual dispute, not based on hypothetical factual scenarios. *Id.* at 472.

The plaintiffs in this case present only hypothetical harm, because without the existence of an unmarried couple seeking to rent from them, they are faced with no actual conflict between their religious beliefs and the law. A federal court cannot exercise jurisdiction unless the plaintiff has sustained or is immediately in danger of sustaining a direct injury as a result of the challenged statute.[2] *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974). This constitutional requirement of an immediately threatened, direct injury is glaringly absent from this case. "Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy between the parties having adverse legal interests of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Golden v. Zwickler*, 394 U.S. 103, 108 (1969).[3]

While a plaintiff does not always have to await actual arrest or prosecution before proceeding with a challenge to a state statute in federal court, *see Thomas*, 220 F.3d at

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[2] Claims implicating the First Amendment have in no way eroded this requirement. *Laird v. Tatum*, 408 U.S. 1, 13 (1972).

[3] The statute authorizing a federal court to declare the rights of litigants by its terms limits such a remedy to cases of "actual controversy." 28 U.S.C. § 2201.

1140 (citing *Babbit v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)), a plaintiff must allege an intention to engage in constitutionally protected conduct that is proscribed by the statute and must face a "credible threat" of enforcement. *Babbit*, 442 U.S. at 298. In *Babbit*, the United Farm Workers challenged a state statute prohibiting unions from making "dishonest" statements during publicity campaigns aimed at convincing consumers to boycott agricultural products. The union interpreted this as forbidding even inadvertent misstatements. *Id.* at 301, 309. The Court viewed unintentional misstatements as "inevitable" in such campaigns. *Id.* at 301. The Court upheld the union's standing on the basis that the statute, as so interpreted, prohibited the union from engaging in speech arguably protected by the First Amendment. The Court explained that the standing and ripeness requirements may be satisfied in the pre-enforcement context if a plaintiff intends to engage in constitutionally protected conduct that is proscribed by the statute and there is a "credible threat" that the statute will be enforced against the plaintiff. *Id.* at 298. The union faced a credible threat of prosecution because its members "inevitably" would violate the statute as the union interpreted it. *Id.* at 302.

Similarly at risk of imminent prosecution was the plaintiff in *Steffel v. Thompson*, 415 U.S. 452 (1974), who was threatened with arrest by police officers for violating Georgia's criminal trespass statute by distributing anti-Vietnam War handbills at a mall. *Id.* at 459. When threatened with arrest, he left the area, but his companion remained and was arrested. The plaintiff brought a declaratory judgment action to challenge the constitutionality of the statute. The Court concluded that it was

unnecessary for the plaintiff to expose himself to actual arrest or prosecution where the alleged threats of prosecution were not "imaginary or speculative," but created a concrete case or controversy susceptible to conclusive judicial determination. *Id.* at 459. The Court found significant that the plaintiff had been "twice warned to stop handbilling," was actually threatened with prosecution by the police, and that the parties had stipulated that if the plaintiff returned to the mall to distribute handbills he probably would be arrested. *Id.* at 455-56 & n.4.

In contrast, the record in this case fails to demonstrate a credible threat of prosecution. Almost five years have passed since the landlords filed their action, and no one has filed a complaint against them. They have no reason to believe that Respondent Haley or ASCHR will now bring an enforcement action against them, without any complaining tenants. Far from "inevitable," the injury they fear is quite speculative – that if and when they someday have a vacancy in their few rental units, an unmarried couple will apply to rent it; they will turn the prospective tenants away; those tenants will file a complaint with the state; and the state will enforce the law against them.

The court of appeals applied these facts to this Court's well-settled principles of standing and ripeness to conclude that the record suggests no credible threat of prosecution. *Thomas*, 220 F.3d at 1141. Enforcement of the challenged statute against these landlords is not inevitable, or even probable; the landlords' perceived threat of prosecution is speculative, and created solely to secure an advisory federal court decision. Under these circumstances, the court of appeals' decision dismissing the landlords' case is entirely consistent with this Court's

precedent involving standing and ripeness in pre-enforcement actions. *See O'Shea v. Littleton*, 414 U.S. 488, 497 (1974) (plaintiff's pre-enforcement claim drifted "into the area of speculation and conjecture"); *Renne v. Geary*, 501 U.S. 312, 321-22 (1991) ("no factual record of an actual or imminent application of [the challenged statute] sufficient to present the constitutional issues in 'clean-cut and concrete form' "); *Laird v. Tatum*, 408 U.S. 1, 13-14 (1972) (plaintiff's fear of someday enforcement insufficient to constitute an injury under Article III); *Los Angeles v. Lyons*, 461 U.S. 95, 104 (1983) (no standing where the plaintiff feared that, in a future encounter with police, the officers might administer an allegedly illegal "chokehol[d]").[4] To hold otherwise would require a court to speculate on the basis of hypothetical allegations to render a decision – a position clearly at odds with the dictates of Article III.

The landlords claim that the decision below conflicts with this Court's holding in *Virginia v. American Booksellers Ass'n*, 484 U.S. 383 (1988) and *Doe v. Bolton*, 410 U.S. 179 (1973). Pet. at 14.[5] This case is quite different,

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[4] The landlords' claim that they have turned away unmarried tenants in the past is insufficient to constitute a present case or controversy. In *Lyons*, the Court dismissed the case despite the fact that members of the class had been subjected to the chokehold. The Court found that "[p]ast exposure to illegal conduct does not in itself show a present case or controversy . . . if unaccompanied by any continuing, present adverse effects." 461 U.S. at 102 (quoting *O'Shea*, 414 U.S. at 495-96.)

[5] The landlords also cite a litany of other Supreme Court decisions that are distinguishable. In *Epperson v. Arkansas*, 393 U.S. 97 (1968), a teacher was allowed to challenge a statute

however, because Alaska's law has had no "chilling" effect on the landlords' behavior. In *Booksellers*, the plaintiff

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prohibiting the teaching of evolution in schools. As the statute had never been enforced, it may have been "more of a curiosity than a vital fact of life" to address the constitutionality of the law. *Id.* at 102. The Court did not discuss justiciability or the credible threat of prosecution requirement. The landlords' reliance on *School District of Abington v. Schempp*, 374 U.S. 203 (1963), is also misplaced. That case involved standing requirements under the Establishment Clause of the First Amendment and involved the rights of parents to bring actions on behalf of their children. *Id.* at 225 n.9. In *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), a private school had third-party standing to assert the rights of its students and parents to enjoin enforcement of a law compelling children to attend public schools in the districts in which they reside. *Id.* at 535-36. Standing was appropriate because injury to the private school was present and irreparable since the children would be prohibited from attending their schools. *Id.* In *FEC v. Akins*, 524 U.S. 11 (1998), this Court held that voters' inability to obtain information required to be released under the Federal Election Campaign Act satisfied the "injury in fact" requirement for Article III standing. The Court noted that statutory language permitting "any person aggrieved by an order of the commission" to file suit in federal court evinced a congressional intent to "cast the standing net broadly," thereby eliminating traditional prudential standing concerns. *Id.* at 20. *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), is distinguishable because the challenged regulation there had a direct effect on the day-to-day business of the plaintiffs and required them to expend substantial sums of money to comply with the regulations. *Id.* at 152-53. Here, the anti-discrimination statute has no effect on the day-to-day business of the landlords, and may never affect them in the future. It also does not cause any economic hardship. *Reno v. Catholic Social Services, Inc.*, 509 U.S. 43 (1993), is also of no help to the landlords. In *Reno*, the claims of illegal aliens challenging Immigration and Naturalization Service temporary resident regulations were not ripe simply

bookstores filed a pre-enforcement facial challenge to a newly-enacted state criminal statute forbidding any person selling sexually explicit materials from displaying them in a manner that would allow juveniles to "examine and peruse" them. 484 U.S. at 387. The booksellers sought to assert the First Amendment rights of adult book buyers in challenging the statute, because the law could limit an adult's access to protected materials. *Id.* at 392-94. The Court concluded that the plaintiffs had standing to challenge the statute prior to its enforcement both because they alleged an actual and well-founded fear that the law would be enforced against them and because the statute had a "chilling effect" on First Amendment activity in censoring free speech – "a harm that can be realized even without an actual prosecution." *Id.* at 393.

Similarly, in *Doe v. Bolton*, 410 U.S. 179 (1973), Georgia physicians had standing to challenge state criminal abortion statutes because of the law's "chilling effect." Although the record disclosed that none of them had been prosecuted in the past, the abortion statute at issue was the successor to another Georgia statute under which physicians were actually criminally prosecuted. *Id.* at 188-89. Since the physicians were regularly consulted by pregnant women, there was a reasonable certainty that they would be prosecuted. The physicians had further alleged a sufficiently injurious "chilling effect" upon their professional conduct (i.e., they were deterred from advising patients to have abortions) to enable them to challenge the statute on behalf of their patients. In any event, since the patients already had standing to challenge the statute in their own right, it was "a matter of no great consequence" that the

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because of promulgation of the administrative regulation. *Id.* at 59.

physicians also were found to have standing. *Id.* at 188. Like the plaintiffs in *Booksellers*, the physicians' only possible opportunity to assert their constitutional rights and the rights of others would have been in a criminal prosecution under the challenged statute.

Unlike the plaintiffs in *Booksellers* and *Bolton*, the landlords in this case can challenge the law in civil administrative proceedings if and when an agency actually brings an enforcement proceeding against them. More significantly, the record here demonstrates that the law has *not* chilled their First Amendment rights. The statute has not dissuaded the landlords from involving themselves in the residential rental business despite their religious beliefs, and they readily admit that they refuse to rent their property to unmarried couples despite the law:

> We decline to rent to unmarried couples, not so that we can try to control their conduct, but instead so that we can control our own conduct and try to conform our own conduct to be consistent with what we understand and believe to be God's command for us.
>
> My husband and I never hide, conceal, or lie about our Christian beliefs regarding cohabitation, and we are honest with unmarried couples as to why we don't rent to them. We do this because as Christians we believe it would be contrary to God's will for us to lie or be untruthful with other people. We also believe it would be wrong to hide our Christian beliefs, since we believe that the Lord Jesus desires us to stand up and be recognized as his children and followers.

Affidavit of Joyce Baker (Pet. App. 174a); *see also* Affidavit of Kevin Thomas (Pet. App. 168a). Thus, the law

has not deterred or chilled the landlords' religious practices. They do not engage in any form of self-censorship and have not changed their behavior because of the statute. "Allegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm." *Laird v. Tatum*, 408 U.S. 1, 13-14 (1972).

Any injury to the landlords depends upon the occurrence of unforeseeable future events.[6] Whether they retain their rental properties, whether the properties ever became available for rent, whether an unmarried cohabiting couple will ever seek to lease their available rental property, and whether an unmarried cohabiting couple will ever complain of discrimination to ASCHR is unknown and unknowable. In the proceedings below, the landlords could not articulate to whom, when, where or under what circumstances they had refused to rent in the past, and although they pledged to violate the law in the future, they could not articulate to whom, when, where or under what circumstances. Given that state prosecution of the landlords for discrimination rests on a string of uncertain contingencies, it may seem curious that they affirmatively sought a declaratory judgment on the law's constitutionality. The reason they do not want to wait to see if Respondent Haley will ever enforce the law against them is because they disagree with the Alaska Supreme Court decision on the issue in *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274 (Alaska), *cert. denied*, 513 U.S.

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[6] A claim that rests upon contingent future events that may or may not occur as anticipated or may not occur at all is not ripe for adjudication. *Texas v. United States*, 523 U.S. 296, 300 (1998).

979 (1994) – thus they are strongly motivated to seek a preemptive advisory decision from the federal court to avoid state court. *See* Petition at 5 & n.7.

The fact that Alaska Supreme Court precedent may govern the landlords' claims in state court is not a basis for standing in federal court, however. In effect, the landlords seek a federal injunction aimed at preventing a state court prosecution based upon the occurrence of future events that might never take place. The Court should respect the state court's ability to interpret and apply federal constitutional law, and assume that the process for seeking review on a writ of certiorari will correct any misinterpretation by state courts. The landlords' attempt to seek an advisory opinion in federal court signals that no harm has yet occurred to them and that they do not want to wait until a credible threat of prosecution exists. Their fear of prosecution is based primarily on the fact that they have identified themselves by filing this case. They should not be able to manufacture standing by claiming a threat of prosecution that they created by attempting to invoke federal court jurisdiction.

The court of appeals' dismissal of the landlords' claims is consistent with this Court's teachings "not to entertain constitutional questions in advance of the strictest necessity." *Poe v. Ullman*, 367 U.S. 497, 503 (1961) (mere allegation that state attorney intended to prosecute any offense under state law insufficient to establish "credible threat of prosecution" for purpose of ripeness). The landlords' fear of arrest or prosecution is imaginary and speculative. The decision below is correct since the landlords could not point to a single prospective tenant that they have turned away because of marital status and

they have never been subject to a complaint despite their participation in the rental business for over ten years. Without an identifiable act of discrimination, a federal court does not have a tangible and concrete factual case and controversy under Article III.

Despite the landlords' arguments to the contrary, the decision below does not conflict with Supreme Court precedent or establish a new test for justiciability. "When plaintiffs 'do not claim that they have ever been threatened with prosecution, that a prosecution is likely, or even that a prosecution is remotely possible,' they do not allege a dispute susceptible to resolution by a federal court." *Thomas*, 220 F.3d at 1140 (citing *Babbit*, 442 U.S. at 298-99 and *quoting Younger v. Harris*, 401 U.S. 37, 42 (1971)). The court of appeals merely applied this Court's well-established precedent to the specific facts of this case.[7]

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[7] In evaluating the prudential aspect of ripeness, the court of appeals applied the two-part test established by this Court in *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967). *Thomas*, 220 F.3d at 1141. In evaluating both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration, the court properly declined jurisdiction over the landlords' case. *Id.* at 1141-42. In this regard, the court of appeals' decision does not conflict with the cases cited at n.48, p. 25 of the landlords' petition, which were ripe for adjudication because the issues involved in those cases were purely legal and a failure of judicial review would have caused substantial hardship to the plaintiffs. *See, e.g., EPA v. National Crushed Stone Ass'n*, 449 U.S. 64, 72 (1980); *Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Dev. Comm'n*, 461 U.S. 190, 201-202 (1983).

The question of whether there is a sufficient threat of prosecution to allow a pre-enforcement challenge is factual and case-specific. The decision below turns upon the unique facts of this case. The decision is correct based upon the record and this Court's well-settled standing and ripeness principles. It is not in conflict with governing Supreme Court precedent. Therefore, the Court has no need to review this case.

II. THE DECISION BELOW DOES NOT CONFLICT WITH DECISIONS FROM OTHER COURTS OF APPEAL.

The landlords assert that the Ninth Circuit's *en banc* decision conflicts "directly and in principle" with decisions of the other United States Courts of Appeal. Pet. at 26-29. To support this assertion, the landlords cite cases from circuits other than the Ninth Circuit where the courts found justiciability. In each case, however, the court merely applied existing, well-settled rules for determining the existence of a case or controversy. These cases support the proposition that the ripeness of a pre-enforcement challenge must be determined on a case-by-case basis, and the landlords' case presents a factual situation that is not ripe for federal court review. Unlike the cases the landlords cite, the harm in this case is hypothetical with no real and substantial probability that the enforcement against them will ever occur.

Beginning with the acknowledgement that "inquiries of this sort are both context-contingent and situation-specific," the First Circuit found justiciability in a case the landlords cite by focusing on facts establishing that (a)

the challenged statute had severe criminal sanctions for noncompliance; (b) the plaintiff had been given a direct warning, indicating that the intended conduct would in fact be punished; and (c) the activity that the plaintiff proposed to undertake was discrete and well-defined. *Rhode Island Assoc. of Real., Inc. v. Whitehorse*, 199 F.3d 26, 28-32 (1st Cir. 1999). In contrast, in this case (a) the only "sanctions" sought in the only two cases ever brought under the statute were civil compliance orders, not criminal penalties, (b) far short of having received a warning, the landlords were completely unknown to the enforcement agency until they filed this action, and (c) the landlords merely aver that at some unknown time in the future, if tenants to which they object come along, they intend to violate the provisions. The "frank consideration of the totality of the circumstances," such as the First Circuit conducted, *id.* at 31, establishes that the landlords here do not face a credible threat of prosecution, and thus their claims are not justiciable.

The Second Circuit case that the landlords cite, *Nutritional Health All. v. Shalala*, 144 F.3d 220, 227 (1998), is wholly inapposite. The court found to be ripe the plaintiffs' claim that their free speech was infringed for the year-and-a-half that the government evaluated whether they could make certain health claims, because they were *necessarily* suffering the restraint, which was an actual, direct, concrete injury. *See also id.* at n.4 (also finding a separate pre-enforcement claim to be unripe and nonjusticiable because plaintiffs had not identified a particular, specific health claim that they wanted to make, nor had they sought approval and been denied).

The Third Circuit case the landlords cite also is distinguishable on its facts. The court determined that the state's promise not to prosecute a minister for speaking against homosexuals was not full and complete, and thus did not erase the potential threat of prosecution of his church. *Presbytery of New Jersey v. Florio*, 40 F.3d 1454, 1458-64 (3rd Cir. 1994). The court then analyzed the complaint's ripeness without regard to the state's empty promise, and found that the church did face a credible threat, because the minister consistently preached using discriminatory language, and was continually discriminating in his position as church reverend. In contrast, the landlords merely claim that if and when unmarried cohabitors seek to rent their apartments, they would then engage in the forbidden conduct. Such a speculative, conditional claim falls short of the consistent and forceful speech in *Florio*. *See also id.* at 1473 (no real and substantial threat of enforcement where, in the two years that the law had been in effect, no suit or complaint had been filed) (Rosenn, C.J., dissenting).

The Fourth Circuit found a pre-enforcement claim justiciable where an anti-abortion group sought to distribute certain advocacy literature without complying with the state's election laws. *North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 709-11 (4th Cir. 1999). The court focused on the chilling effect of the challenged laws on the group's free speech rights, however, and found to be reasonable the group's fear that it would be prosecuted for the distribution. The landlords' case has very different prudential concerns than those present in a literature-distribution case – namely, without any particular "victims" of past discrimination, or any specific names,

words, time, or context with respect to intended future discrimination, the record is devoid of a concrete factual situation, and is not fit for judicial review.

Nor is the landlords' example of the Fifth Circuit's "conflict" inconsistent with the Ninth Circuit's decision on the justiciability of this case. In *Doe v. Beaumont Ind. Sch. Dist.*, 173 F.3d 274, 283 (5th Cir. 1999), the court granted standing to students who attended a school where students were randomly selected for counseling by clergy, without advanced notice or consent, because those children were in a pool of students from which participants were chosen. The court concluded that the students were actually threatened with harm by the program and thus had the proper "injured party" status. *Id.* at 285. The court based this holding in part on the nature of an establishment clause claim, under which there is no need to wait for actual violations of a plaintiff's rights, and where there are heightened concerns with protecting children's freedom of conscience from coercive pressure in public school. *Id.* at 284.

The landlords' purported support from the Sixth and D.C. Circuit Courts also is unpersuasive. These courts heavily rely upon the plaintiffs' substantial economic injury, and the "inevitable" enforcement against them. *See National Rifle Ass'n v. Magaw*, 132 F.3d 272, 285, 289 (6th Cir. 1997) (gun manufacturer's pre-enforcement challenge to law prohibiting manufacture of certain semiautomatic weapons was justiciable where the law had sufficient "chilling effect," caused economic hardship, and where the government intended to enforce the law against *this* plaintiff); *Navegar, Inc., v. United States*, 103 F.3d 994, 1000 (D.C. Cir. 1997) (pre-enforcement challenge allowed

where gun manufacturer's failure to comply with Crime Control Act would inevitably lead to prosecution). Unlike those plaintiffs, the landlords are not suffering substantial economic hardship because of the challenged law. The threat of enforcement against the landlords is hardly inevitable here, given that there are no past or potential identifiable "victims" of the discrimination that could give their case the proper parameters of a concrete controversy.

The Seventh Circuit follows the general standing rule that a "concrete injury" is necessary, and denied standing where a plaintiff attempting to bring a pre-enforcement claim could not show economic injury from the challenged ordinance. *Hays v. Urbana*, 104 F.3d 102, 103-04 (7th Cir. 1997) (concluding that since the plaintiff could not prove that it had "costs of compliance necessary to avoid prosecution," it lacked standing). This conclusion does not conflict with the Ninth Circuit's decision in this case. Rather, it supports the conclusion that because the landlords have not alleged economic injury and indeed have pointed to no other concrete injury that could substitute for economic costs, the case is not justiciable.

Illustrating yet again that the justiciability question is highly fact-specific, the Eighth Circuit determined that where a federal election regulation could chill an activist organization's rights, and where that regulation carried criminal penalties, a sufficient case or controversy existed to allow the pre-enforcement challenge. *Minnesota Citizens Concerned for Life v. Federal Election Comm.*, 113 F.3d 129, 130-31 & n.4 (8th Cir. 1997). That case involved political expression and a facial challenge to a regulation not present here.

Finally, in yet another case focusing on the "chilling" effect of a challenged statute, the Tenth Circuit found standing and ripeness where the ACLU and internet providers challenged a law criminalizing computer dissemination of sexually explicit materials to minors. *ACLU v. Johnson*, 194 F.3d 1149 (10th Cir. 1999). The threat of actual criminal prosecution was real and imminent. *Id.* at 1154-55.

All these cases the landlords cite demonstrate that other Circuit Courts of Appeals consistently apply the same well-settled legal standards to determine whether a claim is justiciable and fit for pre-enforcement review. Pointing out a number of decisions where justiciability was found does not establish that there is a conflict in the legal principles, but rather demonstrates that in this area of the law, the particular facts presented in each case determine the outcome. Because standing and ripeness issues are so dependent upon specific factual circumstances, it cannot be said that the court of appeals' decision in *Thomas*, which applied the well-settled legal standards articulated by this Court, conflicts with other Courts of Appeals' decisions under Article III.

III. THIS CASE DOES NOT RAISE UNANSWERED QUESTIONS OF CONSTITUTIONAL LAW.

This case does not involve important recurring questions of unanswered federal constitutional law regarding standing and ripeness requirements under Article III. The requirements for standing and ripeness are well-settled and have already been addressed by this Court. The

decision below affects only the landlords and no other parties bringing pre-enforcement challenges.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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In Her Official Capacity
As Executive Director of ASCHR

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

GARY BAKER, JOYCE BAKER and KEVIN THOMAS, Plaintiffs, v. ANCHORAGE EQUAL RIGHTS COMMISSION, MUNICIPALITY OF ANCHORAGE, and PAULA HALEY in her official capacity as the EXECUTIVE DIRECTOR OF THE ALASKA STATE COMMISSION FOR HUMAN RIGHTS, Defendants.	Case No. A95-274 CI (HRH) Consolidated

AFFIDAVIT OF PAULA M. HALEY

STATE OF ALASKA)
) ss.
THIRD JUDICIAL DISTRICT)

Paula M. Haley, being first duly sworn, deposes and states:

1. I am the Executive Director of the Alaska State Commission for Human Rights ("ASCHR" or the "Commission"). ASCHR is the agency of the State of Alaska charged with the duty of administering and enforcing the Alaska Human Rights Act, AS 18.80.010 – .300 ("the Act"). I have been the Executive Director of ASCHR since October 1988.

2. As Executive Director of ASCHR, I oversee the fiscal activities of the Commission. This includes the preparation of the agency's budget and the expenditure of appropriated funds. I also implement agency policy regarding human rights as established by the commissioners in public hearing decisions and Commission meetings. The Commission consists of seven commissioners appointed by the governor for staggered terms of five years and confirmed by the legislature. The commissioners set agency policy and issue decisions based upon their understanding of the Act.

3. I supervise all agency staff. The staff is comprised of eight investigators, a director of central investigations, a director of special investigations, staff attorney, and an administrative officer. There are also four clerical employees.

4. The investigators investigate whether a complaint filed by an individual alleging a violation of the Act is supported by substantial evidence. The procedures for individuals filing complaints are set out in AS 18.80.100 and 6 AAC 30.210. Basically, any individual who believes he or she has been discriminated against in violation of the Act can file a complaint. I can also file a complaint of discrimination on behalf of an individual or class of persons when acts or practices allegedly in violation of the Act come to my attention. *See* AS 18.80.100; 6 AAC 30.220.

5. I have reviewed the motion for summary judgment filed by Gary Baker, Joyce Baker, and Kevin Thomas. I never heard of these individuals until they filed an amended complaint naming me as a defendant. I checked ASCHR's records and found that there has never been a complaint filed by an individual against Gary Baker, Joyce Baker, or Kevin Thomas with the Commission. In addition, I have never filed a complaint against these individuals in my capacity as Executive Director.

6. I also checked to see if the Commission's staff has ever investigated a housing discrimination complaint where a landlord has raised a freedom of religion defense. There have been no such cases. As a result, I have never reviewed any investigator's findings recommending that there is substantial evidence of discrimination in cases involving religious issues as raised by the Bakers and Kevin Thomas.

7. I am familiar with the work-share agreement in effect between ASCHR and the AERC. The work-share

agreement consists of a Letter Agreement and a Memorandum of Understanding between ASCHR and the AERC. These documents are attached to my affidavit as Exhibit A. The purpose of the work-share agreement is to efficiently coordinate the handling of discrimination complaints alleging a violation of the Act and Title 5 of the Anchorage Municipal Code (AMC 5.10.010). It also avoids duplicative administrative investigations. The agencies make independent decisions regarding the applicability of the law or ordinance they are charged to enforce. As noted in the memorandum of understanding, ASCHR is responsible for enforcement of the provisions of the Alaska Human Rights Act, AS 18.80.010 – .300 AERC has no authority to enforce the provisions of AS 18.80 or act on the Commission's behalf under the agreement. The only entity that can enforce Title 18 is ASCHR. However, the Act does provide for private right of actions to enforce its provisions under AS 18.80.145 and AS 22.10.020 (I).

8. Under the work-share agreement, each agency must inform a person filing a complaint of their right to file a complaint with the other agency, if appropriate. *See* Letter of Agreement section IVA. Each agency has to inform the individual filing the complaint that their complaint will be dual-filed with the other agency unless that person requests otherwise.

9. If a complaint is dual-filed, either ASCHR or AERC can investigate the complaint of discrimination, depending upon which agency received the complaint first. Under the work-share agreement, each agency

agrees to review the final action by the agency that initially processed a co-jurisdictional complaint for adoption. If AERC conducts an investigation into a complaint that has been co-filed, AERC's findings are forwarded to our agency. Director of Special Investigations, Helen Sharratt, reviews AERC's findings to determine whether ASCHR will adopt the findings. She determines whether the AERC's investigation was adequate and whether she agrees with the recommendations and conclusions of AERC, given the requirements of AS 18.80. There have been a number of cases investigated by AERC that have not been adopted by ASCHR. But ASCHR has never reviewed or adopted any of AERC's findings that involve allegations of housing discrimination where a landlord has raised a freedom of religion defense.

10. I am familiar with the cases of *Foreman v. Anchorage Equal Rights Comm'n*, 779 P.2d 1199 (Alaska 1989) and *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274 (Alaska 1994). I was employed as the staff attorney for AERC at the time of the *Foreman* case. The landlord in *Foreman* argued that AS 18.80.240(2) preempted the Municipality's right to enforce the Anchorage Municipal Code. I argued that AS 18.80.240(2) did not preempt AMC 5.20.020. Because of my familiarity with the case, I can represent that *Foreman* did not involve the freedom of religion issues that have been raised by the Bakers and Kevin Thomas in this case.

11. The complaints of housing discrimination in *Swanner* were co-filed with the AERC and ASCHR in accordance with the work-share agreement. Because the complaints were first filed with the AERC, AERC investigated the charges. AERC notified ASCHR of the filing,

and ASCHR sent Swanner a letter notifying him of the co-filing. This was ASCHR's only involvement in the *Swanner* case. ASCHR has never adopted AERC's findings in *Swanner*. For some unknown reason, AERC never sent its findings in *Swanner* to ASCHR for review.

12. Although I direct the agency's activities, I do not enforce the provisions of Title 18. I have no authority to order a party from engaging in any alleged discrimination. Enforcement of the Act is ultimately a decision reached by the commissioners after the conclusion of a hearing. As I noted earlier, I have never reviewed or taken any case forward to the commissioners where a landlord has raised religious issues in defense of a housing discrimination complaint. ASCHR has never had an opportunity to address the issues raised by the Bakers and Kevin Thomas in a hearing before the Commission. The issues raised by the Bakers and Kevin Thomas involve policy issues that must be determined by the commissioners. Therefore I have no authority to comment on the merits of the plaintiffs' claims.

Further your affiant saith naught.

/s/ Paula M. Haley
Paula M. Haley

SUBSCRIBED AND SWORN TO before me this 15th day of December, 1995.

/s/ Faye G. Fellers
Notary Public in and for Alaska
My Commission expires: 3/2/99

LETTER AGREEMENT
BETWEEN
ANCHORAGE EQUAL RIGHTS COMMISSION
AND
ALASKA STATE COMMISSION FOR HUMAN RIGHTS

I. PURPOSE

The Letter Agreement revokes and supersedes the Letter Agreement entered into on April 27, 1983. The purpose of this document is to clarify and specify the language contained in the *Memorandum of Understanding* entered into by the Anchorage Equal Rights Commission and the Alaska State Commission for Human Rights. Hereinafter the Alaska State Commission for Human Rights and the Anchorage Equal Rights Commission will be referred to as the party or parties.

II. LEGAL AUTHORITY

This document is intended to interpret and implement the *Memorandum of Understanding* and is not intended to supplant that document. To the extent that a section or sections of this document is found by a party or parties to the Memorandum to be inconsistent with the plain meaning of the Memorandum, that section or sections shall be of no force or effect. Sections of the Letter Agreement shall remain in force.

III. FILING COMPLAINTS OF DISCRIMINATION

A. The parties agree that the format for complaints shall parallel the format utilized by the U.S. Equal Employment Opportunity Commission (EEOC), and in appropriate circumstances, the format required by Title VIII of the Civil Rights Act of 1968.

B. The parties agree that the transcription of complaints shall be entered on the complaint form of the initial contact agency, and the resulting complaint forms together with transmittal documents shall be forwarded to the companion agency. In no event shall a complainant be permitted to deliver documents to the other party.

C. Each party shall review transmitted complaints for jurisdictional requirements and shall inform the worksharing agency of acceptance or rejection of complaints.

IV. DIVISION OF INITIAL COMPLAINT PROCESSING RESPONSIBILITIES

A. Each party shall inform inquirers of their right to file a complaint with the other party when appropriate.

B. Each party shall advise potential complainants that under the *Memorandum of Understanding* complaints will be dual-filed with the other party unless requested otherwise.

C. The Alaska State Commission for Human Rights agrees that the following types of dual-filed complaints may be waived to the Anchorage Equal Rights Commission for investigation as jurisdictional and other reasons require:

1. Complaints of housing discrimination occurring within the geographical boundaries of Municipality of Anchorage.

2. Complaints filed against Municipality of Anchorage, including the Anchorage School District.

V. RESOLUTION OF COMPLAINTS

A. The parties agree that the processing of all dual-filed complaints shall conform to the complaint processing procedural standards outlined in EEOC Order 916, Appendix A, or in the case of housing discrimination complaints, the Uniform Criteria for FHAP Payment.

B. The parties agree to notify one another on a monthly basis of closures of dual-filed complaints by submitting copies of closure documents from each closed case of the preceding month, as indicated below:

1. Administrative Closure: Closure Memo, Investigator's Memo or other justification, Closing Order and any other documents that may become necessary.

2. Settlement: Agreement signed by all parties, Closure Memo (indicating dollar value of monetary remedy), Closing Order and any other documents that may become necessary.

3. Determination or Findings of Fact: Investigator's Memo, Determination, Closing Order and any other documents that may become necessary.

4. The parties further agree to furnish the other with the last known name and address of respondent and complainant in each case resolution.

C. The parties agree that concurrence or nonconcurrence with the investigative results of dual-filed complaints processed by one party shall be determined by the party reviewing for adoption.

VI. IMPLEMENTATION OF WORKSHARING

A. Each party shall designate in writing a staff member to operate as a liaison to the other agency for the purpose of implementing the *Memorandum of Understanding* and the Letter of Agreement.

B. This Letter of Agreement shall become effective upon the date of endorsement and shall remain in effect until formal notice of termination is received by the parties. Formal notice of termination shall be provided 60 days prior to any intended termination.

C. Any changes or amendments to this Letter Agreement shall be in writing and shall be approved and executed by the Executive Directors of the respective parties.

DATED AT ANCHORAGE, ALASKA this [illegible] day of April, 1987.

ALASKA STATE COMMISSION FOR HUMAN RIGHTS

/s/ Janet L. Bradley
Janet L. Bradley
Executive Director

ANCHORAGE EQUAL RIGHTS COMMISSION

/s/ Paul L. Connerty
Paul L. Connerty
Executive Director

MEMORANDUM OF UNDERSTANDING BETWEEN THE ALASKA STATE COMMISSION FOR HUMAN RIGHTS AND THE ANCHORAGE EQUAL RIGHTS COMMISSION

I. PURPOSE

The purpose of this Memorandum of Understanding is to provide for efficient coordination and cooperation in the handling of discrimination complaints pursuant to AS 18.80.010 et seq., and Title 5 of the Anchorage Municipal Code, (AMC 5.10.010. et seq.).

II. LEGAL AUTHORITY

A. The Alaska State Commission for Human Rights (ASCHR) is responsible for the administration and enforcement of the provisions of the Alaska Human Rights Law (AS 18.80.010 et seq.). As 18.80.220-.255 prohibits discriminatory practices in the State of Alaska on the basis of race, religion, color, national origin, age, sex, marital status, changes in marital status, pregnancy, parenthood and physical handicap. AS 18.80.220-.255 prohibits discrimination in employment, places of public accommodation, real property transactions, financing practices and government services.

B. The Anchorage Equal Rights Commission (AERC) is responsible for the administration and enforcement of the Anchorage Equal Rights Ordinance (AMC 5.10.010 et seq.). That ordinance prohibits discriminatory practices in employment, housing, public accommodations,

education, financing practices, and practices of the Municipality of Anchorage, on the basis of race, color, sex (including pregnancy and parenthood), religion, national origin marital status, age, or physical handicap.

III. FILING COMPLAINTS OF DISCRIMINATION

A. In order to facilitate the goals of AS 18.80. et seq. and AMC 5.10.010 et seq., ASCHR and AERC each designate the other as its agent to receive discrimination complaints.

B. Each agency shall inform a complainants of their rights to file with the other agency, and will endeavor to aid any person alleging discrimination to draft a charge in the manner which meets the requirements of the other agency.

C. Each agency shall forward all appropriate complaints to the other agency within 48 hours of filing or as soon thereafter as is practicable.

D. Each agency reserves the right to make an independent determination of jurisdiction pursuant to its own law or ordinance or complaints that are initially accepted as co-jurisdictional complaints.

IV. DIVISION OF INITIAL COMPLAINT PROCESSING RESPONSIBILITIES

A. ASCHR and AERC agree that the intent of the laws they administer can be served best by dividing primary responsibility for the resolution of complaints, reducing duplication of effort.

B. Each agency shall initially process all complaints it receives except for those assigned to ASCHR in paragraph IV. C. below.

C. ASCHR shall initially process the following categories of complaints:

1. Complaints which are filed more than 120 days after the date of the alleged unlawful act;

2. Complaints alleging unlawful discrimination within the State of Alaska, but not within the Municipality of Anchorage;

3. Complaints where an agency of the State of Alaska is a party;

4. Complaints against respondents which may be designated for initial processing by ASCHR;

5. Complaints filed by the Executive Director of ASCHR and related individual charges;

6. Complaints where ASCHR is a party to a concilliation [sic] agreement or a consent decree which is relevant to the disposition of the complaint; and,

7. Complaints alleging retaliation for filing a complaint with ASCHR or for cooperating with ASCHR.

D. Notwithstanding the provisions of paragraph IV. B. and C., ASCHR and AERC may request and be granted from the agency originally receiving the complaint the right to initially process any complaint. Such variations shall be consistent with the objectives of this Memorandum of Understanding.

E. If for any reason either agency determines it cannot process a complaint for which it bears initial responsibility pursuant to this agreement, that agency shall inform the other agency of its inability to process the complaint as soon as is practicable after the complaint is filed.

F. ASCHR and AERC shall implement their division of initial complaint processing responsibilities with due regard to the agency preferences of complainants.

V. RESOLUTION OF COMPLAINTS

A. ASCHR and AERC agree to utilize charge processing standards set forth in EEOC Order 916, Appendices A and B (Substantial Weight Review procedures).

B. ASCHR and AERC agree to make available to each other case files and other related documents obtained in processing co-jurisdictional complaints. ASCHR and AERC agree to comply with confidentiality requirements under state law and municipal ordinance.

C. Each agency agrees to review final action by the agency that initially processed a co-jurisdictional complaint for possible adoption under the reviewing agencies law or ordinance. ASCHR and AERC agree to notify each other before a potential release of case files and other related documents obtained in processing co-jurisdictional complaints. When one agency does not concur with the result reached by the other agency, the reasons for nonconcurrence shall be provided.

VI. IMPLEMENTATION OF WORKSHARING

A. Each agency shall designate one person as a liaison officer for interagency contacts concerning day-to-day operations under this Memorandum of Understanding.

B. ASCHR and AERC shall confer periodically during the operation of this agreement to ensure that co-jurisdictional complaints are processed with due regard to the rights, duties and legal obligations of the agencies and parties to complaints.

C. ASCHR and AERC shall support each other in all reasonable efforts to ensure sufficient funding to effectively enforce the applicable state and municipal laws and ordinances.

D. This agreement shall become effective on the date of endorsement, and will remain in effect until formal written notice of termination is received by the participating agencies. Formal written notice of termination shall be provided sixty (60) days prior to any intended termination.

DATED AT ANCHORAGE, ALASKA, this 24th day of July, 1982.

ALASKA STATE COMMISSION FOR HUMAN RIGHTS

by: /s/ Dorothy M. Larson
DOROTHY LARSON
Chairperson

ANCHORAGE EQUAL RIGHTS COMMISSION

by: /s/ James W. Kelly
JAMES W. KELLY
Chairperson

Supreme Court, U.S.
FILED
JAN 9 2001
CLERK

(4)

No. 00-499

IN THE

Supreme Court of the United States

KEVIN THOMAS AND JOYCE BAKER,

Petitioners,

v.

ANCHORAGE EQUAL RIGHTS COMMISSION, MUNICIPALITY OF ANCHORAGE, PAULA HALEY in her official capacity as the Executive Director of the Alaska State Commission for Human Rights,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

This case presents important Article III questions of law in contexts of (1) the Ninth Circuit's defiance of this Court's precedent; and (2) multiple conflicts between the Ninth and other circuits regarding principles of law. Haley is mistaken in her notion that differing facts explain away the apparent conflicts.[1] The Ninth Circuit's aberrant en banc decision in this case is not absolved by the factual nuances of Article III standing and ripeness. The decision below machinates definite conflicts in principles of Article III law between the Ninth Circuit, this Court, and other federal courts of appeal. This Court should address and resolve those conflicting Article III principles of law in the context of this important First Amendment case.

ARGUMENT

I. THE NINTH CIRCUIT'S EN BANC DECISION DEFIES PRINCIPLES OF ARTICLE III LAW

---

[1]There is not one disputed fact in this case regarding Thomas' and Baker's (a) sincere religious beliefs regarding marriage, cohabitation, facilitation of sin, and honoring their government by obeying the law; (b) property ownership; (c) business policies and practices to offer their rental units for let by excluding unmarried *cohabiting* couples as potential tenants; or (d) past and present violations of the anti-discrimination laws. (App. 165a-169a, 171a-176a) There are no disputed facts in this case regarding the government's (a) statutory and judicial mandate to enforce the proscriptive laws (*Hotel, Motel, Restaurant, Constr. Camp Employees & Bartenders Union v. Thomas*, 551 P.2d 942, 945 (Alaska 1976)); (b) past and present enforcement of the laws against identical landlords (*Foreman v. Anchorage Equal Rights Comm'n*, 779 P.2d 1199 (Alaska 1989); *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274 (Alaska 1994); Appendix G); and (c) actual verbal threat to enforce the laws against identical landlords. (App. 187a)

ESTABLISHED BY THIS COURT'S CONTROLLING PRECEDENT

The Ninth Circuit's decision cannot be justified by Haley's supposed factual distinctions. This Court's decisions establish concrete principles of Article III law which the Ninth Circuit defied in *Thomas*.[2] First, the Ninth Circuit defied this Court's rule that a pre-enforcement First Amendment challenge to a prospective law carrying legal penalty for violation is justiciable if it is brought by a plaintiff who is or will be squarely subject to the laws proscriptions, at least absent an express government disclaimer of an intent to enforce. *See Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 386-393 (1988);[3] *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298-301 (1979);[4] *Doe v. Bolton*, 410 U.S. 102, 140

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[2]*Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1143-1151(9th Cir. 2000) (en banc) ("O'Scannlain, J. concurring; Kleinfeld, J., dissenting).

[3]In *Booksellers* the plaintiffs maintained a challenge despite the fact that the law had never become effective, despite the fact that the plaintiffs had never violated the law or even yet taken action in response to it, and despite the fact that it was uncertain when in the future the plaintiffs might ever take action or be charged. The Court allowed the suit to proceed because the law was proscriptive, carried legal penalty, by its existence threatened prospectively to "chill" First Amendment rights, and because the government would not disclaim an intent to enforce the law in the future. 484 U.S. at 388-393.

[4]In *Babbitt*, the plaintiffs were allowed to challenge the law's union election procedures despite their failure to invoke, and their disclaimer of an intent to invoke, election procedures simply because (a) the law worked a present harm to their associational right to organize (they were dissuaded from holding elections because of the law's onerous procedures); and (b) they faced potential future harm to be incurred in the event of an election (which they had no intention of holding). 442 U.S. at 299-301 and n. 12.

(1973);[5] *Epperson v. Arkansas*, 393 U.S. 97, 102 (1968);[6] *Reno v. Catholic Social Services*, 509 U.S. 43, 57 (1993). As the Court stated in *Reno:* "[i]n some cases, the promulgation of a regulation will itself affect parties concretely enough to satisfy" the ripeness component of justiciability. *See also Pacific Gas & Elec. Co. v. State Energy Res. Cons. and Dev. Comm'n*, 461 U.S. 190, 200-202 (1983);[7] *EPA v. National Crushed Stone Ass'n*, 449 U.S. 64, 72 n. 12 (1980);[8] *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140, 152-153 (1967); *Gardner v. Toilet Goods Ass'n, Inc.*, 387 U.S. 167, 171-172 (1967).

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[5]The plaintiff doctors in *Bolton* challenged a law which in its five year existence had never been enforced or threatened against anyone. 410 U.S. at 185-189.

[6]In *Epperson*, which was decided after *Poe v. Ullman*, 367 U.S. 497 (1961), a teacher challenged a law which had never been enforced or threatened against anyone in any manner, civil or criminal, in its entire forty (40) year existence, and despite this Court's express acknowledgment that the law was "more of a curiosity than a vital fact of life." 393 U.S. at 100-102. According to this Court's express ruling in *Epperson*, it was the Court's "duty to decide the issues presented" by the proscriptive law which by its terms *alone* and not by its application or enforcement, affected First Amendment rights. *Id.* at 102. The primary thing that was "patent" and "inevitable" in *Epperson*, was that the law in question would never be placed in "operation." See *Reno*, 509 U.S. at 69 (O'Connor, J., concurring).

[7]In *Pacific* this "Court permitted utilities to challenge a state law imposing a moratorium on the certification of nuclear power plants, even though the utilities had not yet applied for a certificate." *Reno*, 509 U.S. at 69 (O'Connor, J., concurring) *citing Pacific*, 461 U.S. at 200-202.

[8]In *National Crushed Stone*, "the Court held that a facial challenge to the variance provision of an EPA pollution-control regulation was ripe even 'prior to application of the regulation to a particular [company's] request for a variance.'" *Reno*, 509 U.S. at 69 (O'Connor, J., concurring) *quoting National Crushed Stone*, 449 U.S. at 72 n. 12.

Where a law is proscriptive in nature and creates a "duty" which the plaintiff must obey subject to legal penalty, the plaintiff's pre-enforcement claim is justiciable "[w]here the inevitability of the operation of a statute against certain individuals [the plaintiff] is patent." *Reno*, 509 U.S. at 57; *Id.* at 68-69 (O'Connor, J., concurring). As Justice O'Connor explained in her *Reno* concurrence:

> "[I]t is irrelevant to the existence of a justiciable controversy that there will be a time delay before the disputed provisions will come into effect."... If it is "inevitable" that the challenged rule will "operat[e]" to the plaintiff's disadvantage . . . then there may well be a justiciable controversy that the court may find prudent to resolve.

509 U.S. at 69 (O'Connor, J., concurring).

In stark contrast to this Court's rulings, the Ninth Circuit declared that "the mere existence of a proscriptive statute nor a generalized threat of prosecution satisfies the 'case or controversy'" requirement ... there must be a 'genuine threat of *imminent* prosecution.'" *Thomas*, 220 F.3d at 1139 (emphasis added). While as a generic statement this assertion is arguably consistent with *Poe*, 367 U.S. at 501-502 (in the context of an antiquated law which is clearly in desuetude such as the Connecticut contraceptive laws which had been in effect for close to a century and not enforced for decades despite widespread violation), it cannot be squared with *Booksellers*, *Babbitt*, *Bolton*, *or Epperson*. In fact, based upon this Court's Article III ruling in *Epperson*, it is debatable whether *Poe*,

which the Ninth Circuit appears to have relied upon heavily,[9] remains good law. *Epperson* appears to have overruled *Poe*.[10]

Second, the Ninth Circuit defied this Court's rule that a plaintiff may mount a pre-enforcement challenge to a law which threatens prospectively to "chill" the exercise of First Amendment rights regardless of any threat of "imminent prosecution,"[11] at least absent a government disclaimer of an intent to enforce. *Booksellers*, 484 U.S. at 393; *Babbitt*, 442 U.S. at 299-301 and n. 12; *accord Epperson*, 393 U.S. at 102.[12] Haley is mistaken in her thought that the "chilling" effect of a law is evaluated retrospectively under Article III. (*Haley*, 10–11) The question is not whether the law in retrospect caused the plaintiff to change her constitutionally protected conduct, but instead whether the law threatens prospectively to

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[9]*See, e.g., Thomas*, 220 F.3d at 1140-1141.

[10]The Ninth Circuit manufactured irrelevant factual questions (*Thomas*, 220 F.3d at 1142 and n. 8, 1144 n. 1, 1149) in order to disregard this Court's rule that prudential ripeness concerns do not exist in a case which presents pure questions of law. *Abbott*, 387 U.S. at 148-153. As Haley's Opposition confirms, there are no genuine issues of material fact in this case and this case strictly involves the application of law to uncontested facts. It makes no difference who the unmarried tenants are that Thomas and Baker have turned away in the past or what their circumstances were, the landlords operate under business policies which decline rental to all unmarried *cohabitants*. The pure question of law at stake herein is whether the landlords are constitutionally entitled to a religious exemption from laws which mandate such rental.

[11]*Thomas*, 220 F.3d at 1139.

[12]In this case, Haley is powerless to give such a disclaimer (*Hotel, Motel*, 551 P.2d at 945), and at oral argument before the Ninth Circuit en banc panel in March, 2000 Respondents *refused* to give such a disclaimer in response to Justice O'Scannlain's direct question.

pressure her (and others) to refrain from constitutionally protected conduct.[13] Under Haley's version of "chilling," only weak-kneed individuals would be able to justiciably challenge a proscriptive law, while the devout and steadfast would be denied their day in federal court.[14]

Third, the Ninth Circuit ignored this Court's rule that present harm to a plaintiff, either in the exercise of her constitutional rights or economically, sustains the justiciability of her claim against a proscriptive law causing the injury regardless of any threat of future enforcement.[15] By contrast the Ninth Circuit ruled that a proscriptive law with legal penalty cannot create a "constitutionally sufficient direct injury," but instead justiciability hinges exclusively upon a "threat of *imminent* prosecution." *Thomas*, 220 F.3d at 1139-

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[13] *Booksellers*, 484 U.S. at 393 (justiciability based upon the "chilling" effect of a law which had never yet become effective and thus had no retrospective operation against anyone).

[14] It requires little foresight to predict that government would challenge the "sincerity" of any religious adherent who abdicated her religious convictions in the face of a proscriptive law.

[15] *See Babbitt*, 442 U.S. at 298-301 (present harm to associational right to organize for election purposes with no threat of enforcement because there was no intent to hold elections); *Bolton*, 410 U.S. at 185 (present harm to associational rights and occupational liberty with no enforcement or threat in the law's five year existence); *Epperson*, 393 U.S. at 100-102 (present harm to associational and speech rights with no enforcement or threat in the law's forty (40) year existence); *School District of Abington Township v. Schempp*, 374 U.S. 203, 225 and n. 9 (1963) (present religious injury suffices in free exercise context). Article III ripeness requirements are not diluted in Establishment Clause cases. *Id.* (while injury need not be religious, plaintiff must be "directly affected by the laws" to bring federal challenge).

1140 (emphasis added). According to the Ninth Circuit, government can civilly enforce with impunity and simply refrain from *criminal* enforcement, thereby immunizing its constitutionally suspect law from federal review.[16]

Fourth, the Ninth Circuit ignored this Court's rule that a mere possibility that government might exercise its discretion to withhold future enforcement, or might exercise its discretion to limit future enforcement to civil action, does not defeat the justiciability of a pre-enforcement challenge.[17] Ignoring Haley's lack of discretion based upon her statutory and judicial mandate to enforce the laws,[18] the Ninth Circuit ruled that a

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[16]By this Court's precedent, when the impact of a law is presently realized by the plaintiff in his or her every-day affairs, presenting the plaintiff with the dilemma of choosing between compliance or legal penalty, justiciability exists for a pre-enforcement challenge. *Reno*, 509 U.S. at 57-58 *citing Gardner*, 387 U.S. at 171-172; *Abbott*, 387 U.S. at 152-153. By contrast, the Ninth Circuit en banc panel scoffingly ignored the immediate effect of the laws on Thomas and Baker, causing them present religious harm, by (a) proscribing their business policies of "offering" units for let in discrimination against unmarried cohabitors (plaintiffs' daily conduct is proscribed by AS 18.80.240; AMC 05.20.020); (b) requiring them to violate their religious beliefs under Romans 13 regarding honoring their government and its laws on a daily basis as they "offer" units for let in discrimination against unmarried cohabitors and periodically as they turn away unmarried couples; and (c) proscribing their religiously motivated speech regarding marriage and cohabitation. AS 18.80.240(3); AMC 05.20.020(C). *See Thomas*, 220 F.3d at 1139.

[17]*See FEC v. Aikens*, 524 U.S. 11, 25 (1998) (justiciability despite the possibility that the FEC might have exercised its discretion in the future to decline prosecution); *Abbott*, 387 U.S. at 154 (justiciability despite the government's claim that the most it *might* do at some uncertain date in the future was pursue *civil* enforcement).

[18]*Hotel, Motel*, 551 P.2d at 945.

general threat of future civil enforcement did not support justiciability. *Thomas*, 220 F.3d at 1139-1141.[19]

Fifth, according to *Abbott* the government's expenditure of considerable effort and money *defending* a law from *civil* constitutional challenge demonstrates a reasonable threat of future enforcement because it demonstrates government's determination to see the law preserved in operation. 387 U.S. at 154 ("the Justice Department is defending this very suit"). In derogation of this decision, the Ninth Circuit ignored Alaska's and Anchorage's expenditure of eleven years of manpower and hundreds of thousands of dollars in public monies defending these laws from constitutional challenge.[20]

II. THE NINTH CIRCUIT'S EN BANC DECISION CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS REGARDING PRINCIPLES OF ARTICLE III LAW

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[19]This Court has ruled that a mere time delay before future enforcement will ensue against a plaintiff who is squarely subject to a proscriptive law, does not defeat justiciability. *Reno*, 509 U.S. at 68 *quoting Regional Rail Reorganization Act Cases*, 419 U.S. 102, 143 (1974). By contrast, the Ninth Circuit ignored the inevitability that Thomas and Baker, landlords with undisputed rental policies and practices proscribed by these laws, will eventually fall into the government's *statutorily and judicially mandated* enforcement "sights" in the future, and ruled that a threat of prosecution must be "imminent," regardless of present harm. 220 F.3d at 1139.

[20]*Swanner* started in 1989 and ended in 1994 and *Thomas* followed in 1995 and continues. The government's determination to preserve these laws in operation is patent. It is disingenuous for Haley to suggest and absurd for the Ninth Circuit to conclude that Alaska and Anchorage would squander enormous public manpower and monies in order to preserve dead letter laws of no import or effect.

The conflict between the Ninth Circuit and other federal courts of appeal created by *Thomas* relates to principles of Article III law not factual nuances. Unlike the Ninth Circuit, other circuits rule that a proscriptive law with legal penalty is sufficient to confer justiciability upon a claim brought by a plaintiff subject to the law, regardless of any threat of prosecution (let alone "imminent" prosecution). *See Rhode Island Assoc. of Real., Inc. v. Whitehorse*, 199 F.3d 26, 28 (1st Cir. 1999); *North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 709-711 (4th Cir. 1999); *Navegar, Inc. v. United States*, 103 F.3d 994, 999-1001 (D.C. Cir. 1997). *Contra* 220 F.3d at 1139.

Unlike the Ninth Circuit, other circuits rule that the prospective chilling of constitutional rights sustains justiciability regardless of any threat of prosecution (let alone "imminent" prosecution). *See Nutritional Hlt. All. v. Shalala*, 144 F.3d 220, 226-227 (2nd Cir. 1998); *ACLU v. Johnson*, 194 F.3d 1149, 1153-1155 (10th Cir. 1999). *Contra* 220 F.3d at 1139. Unlike the Ninth Circuit, other circuits rule that the inability to predict when a violation of the law or an enforcement might occur is not an obstacle to justiciability. *See Presbytery of New Jersey v. Florio*, 40 F.3d 1454, 1458-1464 (3rd Cir. 1994); *Doe v. Beaumont*, 173 F.3d 274, 280-284 (5th Cir. 1999); *Hays v. City of Urbana*, 104 F.3d 102, 103-104 (7th Cir. 1997).[21] *Contra* 220 F.3d at 1139-1140.

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[21]The Seventh Circuit's decision in *Hays* is likely the most direct conflict with *Thomas*. In *Hays* the Seventh Circuit rejected the government's claim that it was too speculative to believe that the plaintiff would ever be subject to the law at issue because the government stated that it would not enforce until it received evidence of some future violation (by way of citizen complaint) on some uncertain future date. 104 F.3d at 103-104. *Compare Thomas*, 220 F.3d at 1139-1140.

Unlike the Ninth Circuit, the First and Third Circuits have held that a government refusal to disclaim an intent to enforce sustains justiciability, regardless of any evidence of any prosecution at any time. *Whitehorse*, 199 F.3d at 28 (justiciability to challenge 20 year old law which had never been enforced); *Presbytery*, 40 F.3d at 1458-1464 (no evidence of when, if at all, clergyman might violate ordinance). *Contra* 220 F.3d at 1140-1141. Unlike the Ninth Circuit, the Sixth Circuit rules that present harm caused by a proscriptive law sustains justiciability, regardless of any threat of prosecution (let alone "imminent" prosecution). *National Rifle Ass'n of America v. MaGaw*, 132 F.3d 272, 282-288 (6th Cir. 1997). *Contra* 220 F.3d at 1139. Finally, unlike the Ninth Circuit, the Eighth Circuit rules that criminal action is not necessary to demonstrate a threat of enforcement, and even a government's civil defense of a law shows an intent to enforce. *Minnesota Citizens Concerned for Life v. FEC*, 113 F.3d 129, 130-131 (8th Cir. 1997). *Contra* 220 F.3d at 1140-1141.

CONCLUSION

For the reasons stated, the Court should grant the petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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Dated: January 9, 2001